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98

WASHINGTON REPORTS

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CASES DETERMINED

IN THE

SUPREME COURT

OF

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JUDGES
OF THE
SUPREME COURT OF WASHINGTON

DURING THE PERIOD COVERED IN THIS VOLUME

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HON. THOMAS J. ANDERS

HON. RALPH O. DUNBAR

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JUDGES

OF THE

SUPERIOR COURTS OF WASHINGTON

During the Pendency Therein of the Cases Reported in this Volume.

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* Term expired January, 1903.

† Term commenced January, 1903.

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OF

WASHINGTON

[No. 4756. Decided January 2, 1904.]

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F. C. LAWRENCE, *Respondent*, v. CORNELIUS PEDERSON,
Appellant.¹

NEW TRIAL—QUESTIONS OF LAW ONLY—REVIEWED REGARDLESS OF DISCRETION OF TRIAL COURT—SALES—OPTION—PAYMENT. In an action to recover commissions for effecting a sale of mining property, where it appears at the trial that only an option had been secured and no sale made thereunder, and a nonsuit is granted, the subsequent granting of a new trial upon the sole ground that the sale had been effected by payment in full since the trial, raises only a question of law, and the ruling is subject to review on appeal without reference to the trial court's discretion.

NEW TRIAL—NONSUIT—PLEADINGS—SUPPLEMENTAL COMPLAINT—NEW CAUSE OF ACTION. After the granting of a nonsuit because no cause of action existed at the time of the trial, a new trial can not be granted or a supplemental complaint allowed to show a cause of action subsequently arising which did not exist when the action was commenced.

BROKERS — SALES — OPTION — PLEADINGS — SUPPLEMENTAL COMPLAINT INTRODUCING NEW CAUSE OF ACTION. In an action to recover commissions for effecting a sale, a written contract optional in form, is not evidence of an actual sale, and a supplemental complaint showing a subsequent sale by payment in full under the option introduces a cause of action not existing before, and can not be sustained on the theory that it merely introduces

¹Reported in 74 Pac. 1011.

new facts showing that the parties construed the transaction as an actual sale from the beginning.

BROKERS—ACTION FOR COMMISSIONS—OPTION NOT A SALE—PART PAYMENT UNDER AN OPTION. A broker, whose contract is to effect a sale, is not entitled to commissions where the contract for the sale of mining property for \$56,500 stipulates that the owner agrees to sell upon the payment of specified amounts at certain times, without any agreement on the part of the purchaser to pay the amounts, although \$2,500 is paid for the privilege of the option, and possession is taken and improvements are made, and later \$5,000 more is paid for an extension, the greater part of the price still being unpaid and there being no assurance that it would be paid.

SAME—CONTRACTS—AMBIGUITY—PAROL EVIDENCE AS TO CONSTRUCTION. Such a contract is in no sense ambiguous and hence parol testimony as to the construction placed thereon by the parties would be inadmissible, and could not establish the fact that the parties considered it as a sale from the beginning.

Appeal from an order of the superior court for King county, Bell, J., entered January 13, 1903, setting aside a nonsuit entered May 15, 1902, and granting a new trial, with leave to file a supplemental complaint, upon plaintiff's showing by affidavits of events occurring since the nonsuit was granted. Reversed.

R. F. Lewis and Wright & Kelleher, for appellant.

Sweeney, French & Steiner, for respondent.

HADLEY, J.—Respondent brought this action to recover from appellant the sum of \$2,325, alleged to be due and owing to respondent as a commission for effecting a sale of certain mining property in Alaska for appellant. The cause was tried before a jury, and at the close of the plaintiff's testimony the defendant moved for a nonsuit. The motion was granted and the jury discharged. The consideration which induced the court to grant the nonsuit appears to have been its construction of the written instru-

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ment pertaining to the sale of the mining property. That written instrument is as follows:

"KNOW ALL MEN BY THESE PRESENTS: that this indenture, made this 21st day of May, 1900, by and between Cornelius Pederson, the party of the first part, resident of Virgen Bay, Prince William Sound, Alaska, and J. D. Meenach, resident of Seattle, Wash., party of the second part, WITNESSETH:

"That the party of the first part, for and in consideration of the sum of forty-six thousand five hundred dollars, lawful money of the United States of America, to be paid as follows: Two thousand five hundred dollars (\$2,500) to be paid at the time of signing this bond, five thousand dollars (\$5,000) to be paid on or before the 21st day of May, 1901, after the aforesaid time; viz., 21st May, 1901, the party of the first part is to receive twenty per cent. (20 per cent.) of the value of the ore, less seven dollars (\$7) per ton, which is to be deducted for shipping and smelting charges; the party of the first part is to take eleven thousand two hundred and fifty dollars (\$11,250) in stock at par value when issued. The stock to be nonassessable. The balance, twenty-seven thousand seven hundred and fifty dollars, is to be paid on or before the 21st day of November, 1902, for and in consideration of the before mentioned moneys, the party of the first part agrees to sell the following described quartz mining property: The Copper King quartz lode and the Convict quartz lode, situate, lying and being in Virgen Bay, Prince William Sound, Alaska, and recorded in Prince William Sound Mining District, reference is hereby made to the records of the aforementioned mining district, for a full and complete description of above quartz lode. Upon payment being made, the party of the first part agrees to give to the party of the second part, good and sufficient deeds for conveying and assuring the title of above mining property free from all incumbrances, all of his right, title, interest, claim, and demand, in and to all of the above mentioned quartz mines. It is hereby agreed and made a consideration, that the party of the second part is to commence work on the aforementioned quartz lodes on or before the 21st day of August, 1900: all

payments to be paid in person, or deposited to the credit of the party of the first part at W. J. Busby's, Blighs Isld., Prince Wm. Sound: in the event of failure of the party of the second part to meet any of the aforementioned obligations, he forfeits all money or improvements to the party of the first part, as a penalty and liquidated damages."

The court construed the instrument to be a mere agreement upon the part of appellant to sell when the proposed vendee should comply with all conditions named, and that the latter was not obligated to buy, but held a mere option to purchase, which he could exercise or not as he chose. It appeared at the trial that the payments had not been made, the time therefor not having expired, and the property had not been conveyed by appellant.

It was contended by appellant, and his view seems to have been adopted by the court, that no sale had yet been effected; that the payment of the balance of the designated purchase price was merely optional with the prospective purchaser; that it might not be paid, and no sale might ever be effected. Respondent's demand for commission was based upon five per cent of the entire selling price, and upon the claim that he had caused an actual sale to be effected. It was the view of the court that a completed sale had not been shown and that respondent was, for that reason, not entitled to recover any commission at that time. Hence the granting of the nonsuit.

The nonsuit was granted May 15, 1902, and thereafter respondent moved for a new trial for alleged errors of law occurring at the trial, particularly specifying that error was committed in withdrawing the case from the jury. The motion was taken under advisement for some months, and, pending a decision thereon, respondent filed a new motion in the nature of a request for a reargument of the motion for new trial. The motion was accompanied by

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affidavits to the effect that, since the granting of the nonsuit, the balance of the purchase price of \$46,500 had been paid and the sale completed. The motion renewed the request for a new trial, and asked leave to amend the complaint or file a supplemental complaint showing that such final payments had been made. On the 13th day of January, 1903, the court granted a new trial, and also leave to file an amended or supplemental complaint. The record shows that the court, in its oral decision, granted the motion upon the ground that the submitted affidavits showed a proper case for allowing the plaintiff to file an amended or supplemental complaint, and for allowing a new trial thereon. The order afterwards entered in the record contained the following:

"Now, therefore, it is ordered that the nonsuit heretofore granted be, and the same is hereby, set aside, and the plaintiff is granted a new trial upon the ground that, as set forth in the said motion and affidavits, payments have been made since the commencement of this suit; and the plaintiff is given permission to file an amended, or supplemental complaint, showing the above facts of payment; subject to the right of the defendant to have the form of the said amended or supplemental complaint settled by the court upon motion, demurrer or otherwise in the usual manner."

This appeal is from said order, and the only assigned error is that the court erred in making its order granting a new trial.

Inasmuch as the order appealed from specifies the exact ground upon which the court granted the new trial, showing that it involved a question of law only and not questions of fact, appellant therefore urges that no other question should be considered here within the rule followed in *Gray v. Washington Water Power Co.*, 27 Wash. 713, 68 Pac. 360, and *Gardner v. Lovegren*, 27 Wash. 356, 67 Pac. 615. The sole ground upon which the court granted the new trial

was that it appeared by affidavits, which were submitted seven or eight months after the nonsuit, that the selling price for the mining property had been fully paid since the nonsuit, and that respondent for that reason should be permitted to shape his complaint so as to state that fact and proceed to a new trial under the amended or supplemental complaint. It was purely a question of law that was decided by the court, and in such a case, as was stated in *Gardner v. Lovegren, supra*, this court will not hesitate to set aside an order granting a new trial, although it might hesitate to interfere with the discretionary powers of the trial court as to a new trial if the order granting it were based upon matters of fact.

Considering the only point decided by the court adversely to the appellant within the rule of *Gray v. Washington Water Power Co., supra*, we think the court erred in making the order upon the ground stated. An actual cause of action must exist at the time of bringing the suit, and if such does not then exist, no cause of action subsequently arising can be introduced by amended or supplemental complaint, or by proof of facts constituting a cause of action and occurring after the beginning of the suit. *Pinch v. Anthony*, 10 Allen 470; *Dickerman v. New York etc. R. Co.*, 72 Conn. 271, 44 Atl. 228; *Willoughby v. Atkinson etc. Co.*, 93 Me. 185, 44 Atl. 612; *Berford v. New York Iron Mine*, 8 N. Y. Supp. 193; *Lewis v. Fox*, 122 Cal. 244, 54 Pac. 823; *Lennox v. Vandalia Coal Co.*, 158 Mo. 473, 59 S. W. 242; *Barker v. Prizer*, 150 Ind. 4, 48 N. E. 4; *Meyer v. Berlandi*, 39 Minn. 438, 40 N. W. 513, 1 L. R. A. 777, 12 Am. St. 663; *Payne v. School Dist.*, 87 Mo. App. 415; Gould's Pleadings (5th ed.), 161.

In *Pinch v. Anthony, supra*, at page 477, the court said:

"We have found no authority that goes so far as to authorize a party who has no cause of action at the time of

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filing his original bill to file a supplemental bill in order to maintain his suit upon a cause of action that accrued after the original bill was filed, even though it arose out of the same transaction that was the subject of the original bill. It would seem to be contrary to principle to allow this to be done."

In *Berford v. New York Iron Mine, supra*, at page 194, the court said:

"Neither by amendment of the original complaint nor by supplemental complaint can facts which occurred after suit brought be made a part of plaintiff's case so as to turn what is no cause of action at all into a good cause of action."

The office of a supplemental complaint is merely to enlarge or change the kind of relief to which a party may be entitled upon a cause of action existing at the time of the commencement of the suit. If, therefore, no cause for any relief exists at the time the suit is begun, a supplemental complaint which avers facts occurring since the commencement of the suit as ground for relief cannot be entertained in the action.

Respondent insists that under the proofs the original complaint showed a cause of action existing when the suit was commenced, that the written instrument quoted above was evidence of an actual sale, that by its terms it could have been enforced by respondent, and that the proposed supplemental complaint merely introduces additional facts which show that the parties themselves construed the writing as meaning an actual sale. We do not think that, because payment may be made in full under a contract optional in form, it follows from that fact that the parties construed the transaction to be an actual sale from the beginning. The evidence of the transaction was the written instrument, and it was for the court to construe its effect. We think the court properly construed the contract when

the nonsuit was granted. We believe by its terms it was not enforceable against the proposed purchaser, and that it was optional with him whether he made the payments or not. Respondent agreed to sell upon certain terms, but the other party did not bind himself to buy, and actually agreed to forfeit all payments made if he should not comply with all conditions named. When the contract was made he paid \$2,500 cash as a consideration for the optional privileges, and later paid \$5,000 more to keep the privileges alive. He entered into possession, and spent money improving the property, as he was required to do if he kept the option alive. If the contract had been intended as a sale, and not as an option, it would have been immaterial to appellant whether the property was improved or not. He exacted that condition, however, evidently upon the theory that the property was still his, and, if the purchase should not be made, the period covered by the contract would not pass without some development of the mine. The time for making all payments had not expired when this suit was begun, or at the time of the trial. The evidence showed that the greater part of the price was unpaid, and it could not then be known that the balance ever would be paid. Under such circumstances, an actual sale was not shown, and respondent was not entitled to recover commission under claim of effecting a sale which was not then such in fact.

Parol evidence is inadmissible to show the construction placed upon a contract by the parties themselves when the intention may be readily ascertained from the contract, as reduced to writing by them. 21 Am. & Eng. Enc. Law (2d ed.), pp. 1113, 1114. The contract here being in no sense ambiguous, evidence in support of the proposed supplemental complaint on the theory, as urged, that the construction placed upon the contract by the parties them-

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selves may be shown thereby, would not only be inadmissible within the above rule, but if admitted would not establish the fact that a sale was made in the beginning, for reasons hereinbefore stated.

The procurement by a broker of a mere optional contract of sale does not entitle him to recover a commission in advance of a sale, when his undertaking is to effect an actual sale. *Dwyer v. Raborn*, 6 Wash. 213, 33 Pac. 350; *Lawrence v. Rhodes*, 188 Ill. 96, 58 N. E. 910; *Aigler v. Carpenter Place Land Co.*, 51 Kan. 718, 33 Pac. 593; *Runyon v. Wilkinson, Gaddis & Co.*, 57 N. J. L. 420, 31 Atl. 390; *Kimberly v. Henderson*, 29 Md. 512; *Tousey v. Etzel*, 9 Utah 329, 34 Pac. 291; *Zeidler v. Walker*, 41 Mo. App. 118.

Since, therefore, the contract pertaining to a sale was an optional one, and since no sale had been effected at the time suit was brought, the respondent was not entitled to recover a commission, and the nonsuit was properly granted; and since, as we have seen, the subject matter of the proposed amendment is not properly matter for a supplemental complaint, but introduces an actual cause of action when none existed before, it was error to grant the motion for a new trial and permit the amendment.

The judgment is reversed and the cause remanded, with instructions to the trial court to vacate the order appealed from and deny the motion for a new trial.

FULLERTON, C. J., and ANDERS, MOUNT, and DUNBAR, JJ., concur.

[No. 4742. Decided January 4, 1904.]

THE AMERICAN BONDING & TRUST COMPANY, *Appellant*,
v. PACIFIC BREWING & MALTING COMPANY,
et al., *Respondents*.¹

CORPORATIONS — STOCK — PLEDGE — ACTION TO COMPEL TRANSFER—REMEDIES OF PLEDGEE—ADEQUATE REMEDY. The pledgee of stock in a corporation, pledged as security for a debt, can not maintain an action to compel the transfer of the stock upon the allegations that the debt is unpaid and exceeds the value of the stock, and that there is no adequate remedy at law; since Bal. Code, § 4264, treats such pledges as any other personal security and authorizes the pledgor to vote and represent the stock; and the remedies of the pledgee are to foreclose the pledge by bill in equity, or to give notice of sale and apply the proceeds, and these remedies are speedy and adequate (*Pt. Townsend Nat. Bank v. Pt. Townsend Gas etc. Co.*, 6 Wash. 597, followed).

Appeal from a judgment of the superior court for Pierce county, Huston, J., entered February 20, 1903, upon sustaining a demurrer to the complaint, dismissing an action brought to secure the transfer of corporate stock. Affirmed.

Frederick H. Murray, for appellant.

James F. O'Brien and *Campbell & Powell*, for respondents.

DUNBAR, J.—The appellant, the American Bonding & Trust Company, a corporation, filed its complaint against the respondents, the Pacific Brewing & Malting Company, a corporation, M. Moses, agent, S. S. Loeb and Blanche Loeb, his wife, and for cause of action alleged, in substance, the corporate capacity of the plaintiff and the Pacific Brewing & Malting Company; that, prior to the commencement of the action, the defendant Loeb owned

¹Reported in 74 Pac. 826.

100 shares of stock of the Pacific Brewing & Malting Company, issued in the name of M. Moses, agent for Loeb, which said stock was assigned to the plaintiff as security for a certain bond of indemnity for the sum of \$10,000, which security it now holds; that a liability exceeding \$7,000 has arisen under said bond of indemnity, whereby and by virtue of which the said stock is liable therefor; that the reasonable value of the stock was worth \$5,000; that dividends have from time to time been declared upon said stock; that, prior to the commencement of the action, plaintiff tendered and delivered said certificate of stock, transferred to it as security aforesaid, to the defendant Pacific Brewing & Malting Company, and demanded that said transfer of said stock be entered on the books of said company and said certificate be cancelled and a certificate in lieu thereof be issued to said company for said shares of stock, and also demanded at said time that dividends accruing, and having accrued, and hereafter accruing and due, on said stock be paid to the said plaintiff, and that no dividends belonging to said stock be paid to Loeb or Moses, agent, and that said demands were by said company refused; that the Pacific Brewing & Malting Company had knowledge of the pledge of said stock to the plaintiff; and that the Pacific Brewing & Malting Company threatens to and will, unless restrained, pay to said Loeb or Moses the dividends due on said stock; that plaintiff has no adequate remedy at law; and prayed, that an order issue from the court commanding and directing the defendant Pacific Brewing & Malting Company to transfer, and register said transfer of stock, on the books of said company, and to forthwith cancel said certificate, and issue to plaintiff, as pledgee, in lieu thereof, the certificate of said company for 100 shares of said stock; that all dividends heretofore accrued, and hereafter accruing, belonging to said stock,

be paid to said plaintiff; and that the said company be enjoined and prohibited from paying the same to said Loeb or Moses; and that temporary injunction issue from and under the direction of the court, restraining the Pacific Brewing & Malting Company from paying dividends due October 1, 1902, and all future accruing dividends; and prayed for costs.

The defendants demurred to the complaint, on the grounds, (1) that the court had no jurisdiction of the subject matter of the action; (2) that the plaintiff had, no legal capacity to sue; (3) that the complaint and showing of the plaintiff does not state facts sufficient to constitute a cause of action, or to grant any relief to the plaintiff. Plaintiff refusing to plead further, judgment was entered for the defendants, and plaintiff appeals.

We think the demurrer was properly sustained on the last ground argued. Section 4264, Bal. Code, provides that any stockholder may pledge his stock by a delivery of the certificate or other evidence of his interest, but may nevertheless represent the same at all meetings and vote as a stockholder. The remedy for a pledgee, under such circumstances, is prescribed by Cook on Corporations (4th ed.), § 476, as follows:

"Where shares of stock are pledged as collateral security for a debt, and the debt is not paid, and the pledgee wishes to apply the stock to the payment of the debt, he has the right to pursue either one of two remedies. He may file a bill in equity for the foreclosure and sale of the pledge; or he may give notice to the pledgor of an intent to sell the stock, and may so sell it without any judicial proceedings, and may apply the proceeds to the payment of the debt."

And it seems to us that these remedies are speedy and adequate, and that the relief asked for by injunction is therefore not available. Our statute seems to contemplate that these securities shall be treated as any other personal

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property security, and the very question at issue here was discussed by this court in *Port Townsend Nat. Bank v. Port Townsend Gas & Fuel Co.*, 6 Wash. 597, 34 Pac. 155, where the court, after citing § 2432, Code of 1881, which is § 4264, Bal. Code, said:

"Said section seems to clearly intend that a stockholder may pledge his stock, and yet to all intents and purposes as between himself and the company and his fellow stockholders, be treated as the owner thereof. This could not be if the pledgee in order to protect himself was compelled to have the assignment regularly made to him, and a transfer thereof recorded in the books of the corporation, for so soon as that was done he would become, as between himself and the corporation, the owner of the stock."

And the suggestion of the appellant in this case, that the transfer to be recorded should be a conditional one, allowing the pledgor to still vote the stock, is met by the further suggestion of the court in the case just quoted, as follows:

"The suggestion of the respondent, that the transfer thus to be recorded might be a conditional one setting out the facts, does not meet with our approval, for the reason that it would so complicate the question of the title to the stock as between the corporation and its stockholders as to seriously interfere with the business of the corporation."

We are satisfied with the reasoning of that case, and believe that the best and most practical and least confusing manner for the pledgee to obtain the benefit of his pledge is as pointed out by Cook on Corporations, as above quoted.

The judgment is affirmed.

FULLERTON, C. J., and HADLEY, MOUNT, and ANDERS, JJ., concur.

[No. 4812. Decided January 4, 1904.]

A. J. RICH, *Appellant*, v. THE CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, *Respondent*.¹

PROCESS—SERVICE ON FOREIGN CORPORATION—RAILROADS—BUSINESS IN THIS STATE. A foreign corporation can not be required to answer in an action *in personam* in this state, unless it is doing business in this state, and no distinction is to be made between railroad and other corporations.

CORPORATIONS—FOREIGN RAILROAD—AGENT TO SOLICIT BUSINESS—DOING BUSINESS IN STATE—PROCESS—SERVICE ON AGENT. Where the only business done in this state by a foreign railroad company is to maintain an advertising agent authorized only to solicit routing via its line, without power to sell tickets, make rates, or obligate the company in any way, and no person within the state is designated on whom process may be served, it can not be required to answer in an action *in personam*, and service upon such an agent is properly quashed.

Appeal from an order of the superior court for King county, Morris, J., entered June 30, 1903, quashing the service of a summons upon a foreign corporation. Affirmed.

H. E. Foster, for appellant, to the point that Benton was shown to be the agent of the respondent, cited: *Tuchband v. Chicago etc. R. Co.*, 115 N. Y. 437, 22 N. E. 360; *Norton v. Berlin Iron Bridge Co.*, 51 N. J. L. 442, 17 Atl. 1079.

John P. Hartman, for respondent. The respondent was not transacting business in this state. *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354; *Doe v. Springfield etc. Mfg. Co.*, 104 Fed. 684; *Maxwell v. Atchison etc. R. Co.*, 34 Fed. 286. Benton was not an "agent" of the company, within the meaning of the law relating to the service of process. *Gottschalk Co. v. Distilling etc. Co.*, 50 Fed.

¹Reported in 74 Pac. 1008.

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683; *Chicago etc. R. Co. v. Walker*, 9 Lea. (Tenn.) 475; *Parke v. Commonwealth Ins. Co.*, 44 Pa. St. 422; *Fairbank & Co. v. Cincinnati etc. R. Co.*, 54 Fed. 420; *Wall v. Chesapeake etc. R. Co.*, 95 Fed. 398; *Boardman v. S. S. McClure Co.*, 123 Fed. 614; and cases *supra*.

FULLERTON, C. J.—The appellant, plaintiff below, brought this action in the superior court of King county against the respondent, The Chicago, Burlington & Quincy Railway Company, to recover for wrongs and personal indignities inflicted upon himself and his family by the agents, employes and servants of the respondent while he was, with his family, riding upon the respondent's train on a ticket purchased at Kansas City, Missouri, entitling him to ride to Seattle, in this state. The wrongs occurred, according to the allegations of the complaint, at Lincoln, Nebraska, and consisted of compelling the appellant and his family to leave a tourist sleeping car, in which he had engaged reservations, and take passage in a day coach. Service of summons was sought to be made upon the respondent by serving one M. P. Benton, alleged to be its agent, residing in the city of Seattle. The respondent appeared specially, and moved to quash the service, which motion the court granted, after a notice and hearing. This appeal is from the order quashing service.

From the showing accompanying the motion, and the findings of the court thereon, it substantially appears that the respondent, The Chicago, Burlington & Quincy Railway Company, is a foreign corporation, organized and existing under and by virtue of the laws of the state of Iowa, and has not complied, nor made any attempt to comply, with the laws of this state with reference to foreign corporations doing business herein; that it neither owns, leases, operates, nor maintains, by itself, or in connection

with any other person, company, or corporation, any line or lines of railway in this state, nor does it receive, accept, carry, or deliver passengers or freight within the state of Washington; that M. P. Benton, the person on whom the service for and on behalf of the respondent was made, was an employe of the respondent, whose duties were to solicit for it passenger and freight traffic—that is, his duties were to try to induce persons who intended to travel, or ship freight, from the state of Washington, to some other place in the United States which could be reached by passing over respondent's railway lines, to take that route, or ship their freight over that route which would pass over such lines; but that he was without authority to make contracts with reference to such traffic, or make any kind of contracts whatsoever on behalf of the company. It was also shown that the respondent had designated no person within the state on whom service of process might be made.

The section of the code (4875 Bal.) relating to the manner of service of summons on corporations reads in part as follows:

"The summons shall be served by delivering a copy thereof, as follows: . . . (4) If against a railroad corporation, to any station, freight, ticket or other agent thereof within this state; . . . (9) If the suit be against a foreign corporation or nonresident joint stock company or association doing business within this state, to any agent, cashier or secretary thereof; . . ."

Counsel have not been able to agree as to which of these subdivisions is applicable to the case in hand, but we think it can make very little difference which of them is held to apply, as in no event can a foreign corporation, whether it be a railroad company or a strictly private corporation, be required to answer to an action *in personam* in this state, unless it be engaged in business herein.

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We so held in the case of a private corporation in *Carstens v. Leidigh etc. Lumber Co.*, 18 Wash. 450, 51 Pac. 1051, 39 L. R. A. 548, 63 Am. St. 906, where it was sought to hold a private corporation on a service made on its president temporarily within the state; and we cannot think the legislature intended to make a distinction, in this respect, between foreign corporations doing a railroad business, and those doing business of a less public nature. Either, to be subject to actions *in personam* in this state, must be doing business herein.

The question then remains, is the respondent doing business within this state? It seems clear to us that it is not. It is not easy to formulate a general rule by which it can be determined, in all cases, whether or not a corporation is doing business at a particular place; but it seems to be the consensus of opinion that a corporation, to be within the rule, must transact, within the state, some substantial part of its ordinary business, continuous in the sense that it is distinguished from merely casual or occasional transactions, and it must be of such a character as will give rise to some form of legal obligation. The respondent, according to the showing made in the record before us, did not come within this rule. The so-called agent is nothing more than a mere advertiser, whose duty it is to explain to intending travelers and shippers of freight the advantages of traveling or shipping over the respondent's lines. He possessed no power to sell tickets, make freight rates, or otherwise obligate the company in any form of contract, and it is difficult to understand what legal obligation he could create on its behalf. Merely advertising its business in a state, is not doing business within such state.

The judgment is affirmed.

HADLEY, DUNBAR, MOUNT, and ANDERS, JJ., concur.

[No. 4886. Decided January 5, 1904.]

SEATTLE BREWING & MALTING COMPANY, *Respondent*, v.
JAMES DONOFRIO, *Appellant*.¹

COMPROMISE—SALE OF GOODS IN SETTLEMENT OF ACCOUNT—FAILURE TO AGREE—ABANDONMENT AND RETURN OF GOODS. Where upon the settlement of an account by the purchase of the debtor's property, the balance of the purchase price is agreed upon, and the property is actually transferred, the debtor can not claim that the testimony conclusively shows a settlement, when it further appears that, upon coming to close the sale, the parties could not agree upon the parties to whom the balance due on the purchase price should be paid, and the creditor thereupon abandoned the settlement and returned the property to the person from whom it was received.

SAME—SALE OF STOCK OF GOODS IN BULK—PAYMENT OF CREDITORS. Upon the settlement of an account by the sale to the creditor of the debtor's entire stock of goods and fixtures of a saloon business, where the vendor was also indebted to others the purchaser is justified in refusing to carry out the settlement unless the balance due on the purchase price is applied to the payment of the other debts, in accordance with the law relating to the sale of stocks of goods in bulk.

COMPROMISE—SALE—ABANDONMENT—AGENT'S AUTHORITY TO ACCEPT RETURN OF GOODS. Where, immediately upon the abandonment of a settlement whereby the creditor was to purchase the debtor's goods, the creditor returns the goods to the debtor's nephew, from whom they were received, and who was in charge of the business at the time of the settlement, there is sufficient evidence to support the finding of the jury that the nephew was the debtor's agent for the purpose of accepting a return of the goods.

VERDICT—AMOUNT OF ASSESSMENT FAVORABLE TO APPELLANT—RIGHT TO ALLEGE ERROR. Where a verdict for the plaintiff is less than the amount conceded to be due, if anything at all is due, the error is not prejudicial to the defendant, and he can not complain that it does not conform to the evidence.

¹Reported in 74 Pac. 823.

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Opinion Per FULLERTON, C. J.

Appeal from a judgment of the superior court for King county, Morris, J., entered February 3, 1903, upon the verdict of a jury rendered in favor of the plaintiff. Affirmed.

Sachs & Hale, for appellant.

Preston, Carr & Gilman, for respondent.

FULLERTON, C. J.—This action was brought by the respondent, who was plaintiff below, against the appellant, to recover the sum of \$1,435.70 alleged to be balances due upon two certain accounts—the first, for beer sold and delivered by the respondent to the appellant; and the second, for moneys advanced by it to his use. The appellant denied the indebtedness alleged in the complaint, and, by way of a further and separate answer, alleged that, at times prior to the 12th day of June, 1902, he became indebted to the respondent in various sums, which on that day aggregated, in principal and interest, the sum of \$3,008; and that they then had a settlement of their accounts, by the terms of which the respondent agreed to, and did, purchase of him certain personal property and property rights and interests, then owned by him, at the stipulated price of \$4,000, and agreed, as a consideration therefor, to cancel the indebtedness above mentioned and pay him the difference, \$992 in cash. He further alleged that, pursuant to such agreement and sale, he delivered to the respondent the personal property, interests, and rights mentioned, and that the respondent has ever since retained the same, but has neglected, failed, and refused to pay him the difference agreed upon. The answer was put in issue by appropriate denials, and, on the issues thus made, a trial was had, resulting in a verdict and judgment in favor of respondent for \$448.

It is first contended that the evidence conclusively shows a settlement between the parties, as alleged in the answer

of the appellant, and consequently, the court erred in refusing to grant the appellant a new trial. But we think the appellant mistakes the effect of the evidence. While it is clear that the parties went so far as to agree between themselves upon the balances due from one to the other, and upon the amount that was to be paid as the purchase price of the property, and made an actual transfer of the same, yet it is equally clear that they failed to agree, when they came to close the transaction, as to whom the balance due on the purchase price should be paid, and that the attempted settlement was then abandoned, and the property theretofore transferred returned by the respondent to the person from whom it received it.

The appellant argues, also, that there was no sufficient cause for an abandonment on the part of the respondent, and that it never returned the property to him; but on both of these questions we think there was abundant evidence to sustain the verdict. The appellant was conducting a saloon, and the property agreed to be sold consisted of his entire stock of goods, fixtures, and business. It was shown that he was indebted in some fifteen hundred dollars, and the respondent conceived that the sale would be void unless the purchase price should be paid upon these debts, in accordance with the statutes relating to the sale of stocks of goods in bulk. It desired, therefore, to pay the balance on this indebtedness, while the appellant demanded that it be paid to him personally, and refused to sign a bill of sale until it was so paid. We think this clearly justifies the respondent in refusing to complete the transaction.

On the other contention, the evidence was that the property was returned to the nephew of the appellant, who had charge of the appellant's business immediately prior to the original transfer, and the person from whom the appellant received the property. While there was some question

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raised as to his right to receive it on behalf of the appellant, still it was a question for the jury, and they decided, we think rightly, that he was the agent of the appellant. Whether, under the testimony, this court would have been warranted in disturbing the verdict had it been for the appellant, is not the question now before us. The question is, was there substantial evidence in support of the verdict? It seems to us, after a careful examination of the record, that not only was there substantial evidence supporting the respondent's case, but that the decided weight of the evidence was with the verdict. There was, therefore, no error on the part of the court in refusing to grant a new trial on the ground of insufficiency of the evidence.

The other contention of the appellant is that the trial court erred in refusing to set aside the verdict of the jury, because it did not conform to the evidence of either the respondent or the appellant as to the amount due upon the causes of action set forth in the complaint. The verdict was for a less sum than the appellant demanded in its complaint and its evidence supported, and for a less sum, also, than the appellant alleged the parties had agreed was due on these causes of action; but this was not an error of which the appellant can complain. This court has repeatedly held that error, to be available, must be prejudicial to the party complaining, and certainly a defendant cannot claim that he is injured because the jury returns a verdict against him for a less sum than the evidence of the plaintiff shows, or he admits, is due. This precise question was before this court in the case of *Jose v. Stetson*, 20 Wash. 648, 56 Pac. 397, where we held it not error to refuse to set aside a verdict returned for a less sum than the evidence warranted, on the complaint of the party benefited by the omission. In that case we said:

"On their second assignment of error the appellants contend there is no evidence in the record from which the jury were warranted in finding the respondents were damaged by the loss of the logs in the sum of \$1,000. They argue that the only evidence on the question of value showed the logs to be worth at the place of delivery the amount stated in the complaint, and 'the verdict of the jury should have been for \$1,925; while the verdict of the jury is for \$1,000. The jury had no right to disregard the testimony and bring in a verdict against the appellants for \$1,000.' The appellants have not called to our notice a case where this contention has been maintained; nor do we think the objection ought to be allowed to avail them. The error operated to the injury of the respondents, not the appellants; and, if respondents choose to waive it, we know no reason why they should not be permitted to do so. The rule is that error, to be available, must operate to the injury of the complaining party. *Brown v. Forest*, 1 Wash. T. 201; *Clancy v. Reis*, 5 Wash. 371 (31 Pac. 971); *McGowen v. West*, 7 Mo. 569 (38 Am. Dec. 468)."

See, also, from other jurisdictions, *Illinois Cent. R. Co. v. Abernathey*, 106 Tenn. 722, 64 S. W. 3; *Terrell Coal Co. v. Lacey* (Ala.), 31 South. 109; *Corbett v. Sayers*, 29 Tex. Civ. App. 68, 69 S. W. Rep. 108.

The appellant, however, cites and relies upon the case of *Tilden v. Gordon & Co.*, 25 Wash. 593, 66 Pac. 50, as being contrary to this principle. But an examination of that case will show that the verdict operated to the injury of the complaining party. Moreover, neither party accepted the verdict, and hence there was no waiver of the mistake or error made by the jury.

The judgment is affirmed.

ANDERS, MOUNT, HADLEY, and DUNBAR, JJ., concur.

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Syllabus.

[No. 4858. Decided January 5, 1904.]

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CHARLES THEIS, *Appellant*, v. SPOKANE FALLS GAS
LIGHT COMPANY *et al.*, *Respondents*.¹

CORPORATIONS—DISINCORPORATION—BONA FIDE INTENT TO DISCONTINUE BUSINESS—FRAUD ON MINORITY STOCKHOLDERS. Bal. Code, § 4275, providing that any corporation may dissolve and disincorporate by application to the superior court upon a vote of two-thirds of the stockholders, authorizes a disincorporation only upon a bona fide intent upon the part of the people interested to discontinue the business, and does not, as against the objection of a single stockholder, authorize a dissolution of a prosperous company for the purpose of enabling the majority stockholders to get control of the business by a sale of the property and the organization of a new corporation, with the same powers, and to continue the same business.

SAME—ACTUAL INTENT TO DISSOLVE—WHEN NOT SHOWN. Actual intent to dissolve a corporation by proceedings to disincorporate is not shown, where the company was prosperous, and a syndicate of the majority stockholders attempted to purchase all the stock, and organized a new company of slightly different name, to operate in the same town, with the same powers and substantially the same owners, and the object was plainly to get rid of a stockholder who had refused to sell his stock.

SAME—SUFFICIENCY OF EVIDENCE. A dissolution of a corporation by proceedings to disincorporate by a two-thirds vote of the stockholders is not warranted by the fact that one object was to secure a larger bonded indebtedness at a less rate of interest, when the majority owners of the stock were also owners of the bonds and consented to release the same upon payment of the cash.

SAME—CONCLUSIVE EVIDENCE OF FRAUD. That such a dissolution was a scheme in the interests of the majority stockholders is conclusively shown by the testimony of their representative to the effect that they were not out here for philanthropy and would not be reducing the rate of interest if it were a benefit to the minority stockholders.

¹Reported in 74 Pac. 1004.

Appeal from a judgment of the superior court for Spokane county, Belt, J., entered July 3, 1903, after a trial upon the merits before the court without a jury, dismissing an action brought by a stockholder to enjoin the sale of the entire property of a corporation. Reversed.

Post, Avery & Higgins, for appellant, to the point that the sale without the consent of all the stockholders was *ultra vires*, cited: *Abbott v. American Hard Rubber Co.*, 33 Barb. Sup. Ct. Rep. 578; *Kean v. Johnson*, 9 N. J. Eq. 401; *People v. Ballard*, 134 N. Y. 269, 32 N. E. 54; *Byrne v. Schuyler El. Mfg. Co.*, 65 Conn. 336, 31 Atl. 833; *Forrester v. Boston etc. Min. Co.*, 21 Mont. 544, 55 Pac. 229, 353; *Parsons v. Tacoma Smelting etc. Co.*, 25 Wash. 492, 65 Pac. 765. The method prescribed for dissolution must be strictly complied with. *Fitzgerald v. Quann*, 109 N. Y. 441, 17 N. E. 354; *Hitch v. Hawley*, 132 N. Y. 212, 30 N. E. 401; *Kohl v. Lilienthal*, 81 Cal. 378, 20 Pac. 401, 22 Pac. 689. The sale of its entire property is a dissolution without compliance with the statute. *Abbott v. American Hard Rubber Co.*, *supra*. A dissolution without a *bona fide* discontinuance of business is a fraud on dissenting stockholders. 2 Cook, Corporations, § 670; *Kean v. Johnson*, *supra*; *Boston etc. R. Corp. v. New York etc. R. Co.*, 13 R. I. 260; *Byrne v. Schuyler El. Mfg. Co.*, *supra*.

George Ladd Munn, Thayer & Belt, and Walker & Munn, for respondents. The statute authorizes a dissolution at the will of two-thirds of the stockholders. Bal. Code, § 4275; *Parsons v. Tacoma Smelting etc. Co.*, 25 Wash. 492, 65 Pac. 765; *Metcalf v. American etc. Furn. Co.*, 122 Fed. 115. Equity will not, at the suit of minority stockholders, enjoin a corporate act, unless it is an attempted exercise of a clearly unauthorized power. *Ma-*

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son v. Pewabic Min. Co., 133 U. S. 50, 10 Sup. Ct. 224; *Oglesby v. Attrill*, 105 U. S. 605. The law has nothing to do with the motive for a legal act. *McFadden v. Mays etc. R. Co.*, 49 N. J. Eq. 176, 22 Atl. 932; *Republican etc. Mines v. Brown*, 58 Fed. 645; *Davis v. Flagg*, 35 N. J. Eq. 491; *Toler v. East Tennessee etc. R. Co.*, 67 Fed. 168; *Shaw v. Davis*, 78 Md. 308, 28 Atl. 619, 23 L. R. A. 294; *Pender v. Lushington*, L. R., 6 Ch. Div. 70. The statute becomes part of the contract, and the court is powerless to inquire into the motives of the majority. *Triscomi v. Winship*, 43 La. An. 45, 9 South. 29, 26 Am. St. 175 (the only case on the precise point); *Cincinnati Volksblatt Co. v. Hoffmeister*, 62 Ohio St. 189, 56 N. E. 1033, 78 Am. St. 707; *Carson v. Iowa City Gas L. Co.*, 80 Iowa 638, 45 N. W. 1068.

DUNBAR, J.—The Spokane Gas Light Company, a corporation, one of the respondents herein, was organized under the general incorporation laws of the state of Washington in the year 1887. Its life, under the articles of incorporation, was fifty years. In March, 1903, three companies of eastern bond buyers, viz., N. W. Halsey & Co., Farson, Leach & Co., and Cyrus Pierce & Co., purchased the bonds outstanding against this corporation, and formed a syndicate for the purpose of purchasing the shares of stock of the corporation, and sent a member of the firm of Cyrus Pierce & Co., Isaac W. Anderson, to Spokane as their representative.

It was the object of Mr. Anderson, as representative of the syndicate, to purchase all the outstanding stock of the company, and nearly all of said stock was so purchased. However, the appellant, Charles Theis, the owner of eight shares of stock, refused to sell his stock to the syndicate. By resolution, passed by a more than two-thirds majority

of the stockholders, it was determined that the entire property of the corporation should be sold; whereupon this action was brought by the appellant to enjoin the sale of the entire property of the corporation. The original defendants were the corporation, A. D. Hopper, the president, W. A. Aldrich, the secretary, and Isaac W. Anderson, a member and the representative of the eastern syndicate. The application for an injunction was denied, and the property was struck off to one Charles S. Reeves, who, it is admitted, had been selected by Anderson to act as agent for the syndicate; and, immediately upon the sale of the property, Anderson filed articles of incorporation of a new company called Spokane Gas Company.

Thereafter, by leave of the court, plaintiff filed a supplemental complaint, and brought in, as additional parties, said Reeves, Spokane Gas Company, and all members of the syndicate. Application was made for an injunction, and a hearing had upon said application. The answer denied that the proposed sale was a scheme of reorganization conceived for the purpose of forcing the small stockholders out of the corporation. It was agreed that testimony should be heard as upon the merits of the case, and it was so heard; and upon said hearing judgment of dismissal of the action was entered by the court, from which judgment this appeal is taken.

A circumstantial review of the testimony in this case would not be profitable, but, from an examination of all the testimony, we are convinced beyond a doubt that the object of the attempt to dissolve the corporation was for the purpose of getting rid of uncongenial minority stockholders. This plainly appears from the testimony of both the appellant and the respondents. The corporation Spokane Falls Gas Light Company appeared by one attorney,

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and the syndicate by another, though it appears from an examination of the record that they regarded their interests as identical. On the question of the object of the dissolution, the syndicate representative, Mr. Anderson, in his testimony, was very candid; evidently construing the statute, which will hereafter be noticed, as granting an absolute right to a two-thirds majority of the stockholders to disincorporate for any reason which seems to them necessary. So that the real question to be determined here is, whether or not the statute confers power upon a two-thirds majority of a prosperous corporation to disincorporate and dispossess minority stockholders of their stock by paying them the market price for the same.

There is some contention in this case that it was the intention of the appellant to obtain a majority of the stock of this corporation and then undertake to do what has been undertaken by the majority stockholders. However that may be, it is not a pertinent question here, for the law would apply to him as it will to the respondents.

It is conceded that at common law a corporation had no power to dissolve excepting by universal consent of stockholders, and that an injunction would be granted upon the application of a single stockholder to prevent such dissolution; but appellant contends that authorities cited to that effect are not in point, for the reason that the statute abrogates the common law rule. Section 4275, Bal. Code, is as follows:

"Any corporation formed under this chapter may dissolve and disincorporate itself by presenting to the superior judge of the county in which the office of the company is located a petition to that effect, accompanied by a certificate of its proper officers, and setting forth that at a meeting of the stockholders, called for the purpose, it was decided, by a vote of two-thirds of all the stockholders, to disincorporate and dissolve the corporation. Notice of

the application shall then be given by the clerk, which notice shall set forth the nature of the application, and shall specify the time and place at which it is to be heard, and shall be published in some newspaper of the county once a week for eight weeks, or if no newspaper is published in the county, by publication in the newspaper nearest thereto in the state. At the time and place appointed, or at any other time to which it may be postponed by the judge, he shall proceed to consider the application, and if satisfied that the corporation has taken necessary preliminary steps and obtained the necessary vote to dissolve itself, and that all claims against the corporation are discharged, he shall enter an order declaring it dissolved."

Under the provisions of this statute, it is the contention of the respondents that an absolute right is given a two-thirds majority to dissolve the corporation whenever they see fit; and the broad ground is taken, that, inasmuch as the corporation is acting within its legal capacity, the court has no right to inquire into the motives which actuated the moving stockholders; that its only concern is to see that the formal legal requirements have been complied with; and such was evidently the theory adopted by the trial court. This, in a sense, is true, and would apply to this case if the actual attempt was to dissolve the corporation, within the meaning of the law. But a court of equity will never aid in the perpetration of a fraud simply because application is made in empty form of law. Its powers are not so superficial, or so restricted. Equity is, we are told, the correction of that wherein the law, by reason of its universality, is deficient. He who asks its aid must present himself with clean hands. Its special mission is to relieve from fraud, and to enforce the observation of broad and just principles. If it appeared from the testimony in this case that this was an attempt to dissolve the corporation, and legal requirements

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had been complied with, the duty of the court to adjudicate such dissolution would be plain; for it is no doubt true that, when the stockholders entered into the contract by which they obtained their stock, they must be held to have contracted with reference to the law which gave a two-thirds majority of the stockholders power to dissolve the corporation.

But as we read the record in the case, there was no attempt to dissolve the corporation, and it cannot be said to have been within the contemplation of the contract that a two-thirds majority, or any majority, had a right to juggle with the corporation and the law. The object of the law is a beneficial one, and is to prevent a small minority from unduly influencing the corporation and preventing its dissolution, under circumstances unfavorable to its existence. But the record here shows conclusively, that no real cause for dissolution existed; that the corporation was making money and prospering in every way; and, while this would probably not be a sufficient reason why a court should not grant the dissolution, it bears upon the question of whether or not there was an actual intent to disincorporate. But it is plainly stated that the object was to get rid of a disagreeable stockholder who would not sell his stock, Anderson testifying that the Spokane Gas Company was formed for the purpose of taking over the gas plant. It is apparent that, if the respondents could have purchased appellant's stock, the disincorporation would not have been thought of. The practice is one which is frequently indulged in for the purpose of what is described in vulgar phrase as "freezing out" small stockholders—a compliance with the letter, instead of the spirit, of the statute—a pernicious practice which the courts of equity cannot too promptly condemn. A dissolution of a corporation within the contemplation

of the law is the death of the corporation. It means a disintegration, a separation, a going out of business.

But in this case, all of the elements of dissolution are wanting. The corporation, with a slightly different name, proceeded in the same town, with the same property, the same powers, and substantially the same owners. All the difference is about what was testified by the president of the corporation—that, after the new company was formed, the minority stockholders' interest would be represented by a deposit in the bank instead of stock in the corporation. It might with as much reason be concluded that a man could escape responsibilities by changing his name, and that, by such change, his moral or financial relations with those with whom he was engaged in business under the old name would be affected. It is not enough to say that appellant received all his stock was worth. He embarked in this business, and had a right to stay in the business during the expressed life of the corporation, or until it was dissolved by a fair compliance with the law. The rule is thus announced by Cook on Corporations, § 670:

“Neither the directors nor a majority of the stockholders have power to sell all the corporate property as against the dissent of a single stockholder, unless the corporation is in a failing condition. Ever since the case of *Abbott v. American Hard Rubber Company* the law has been clearly established in this country that a dissenting stockholder may prevent the sale of all the corporate property by the directors or by a majority of the stockholders, where the corporation is a solvent, going concern. And even where a dissolution is the purpose in view, yet, if the corporation is a prosperous one, such a sale cannot be made. Indeed it is very doubtful whether a dissolution can ever be had by a majority of the stockholders where the corporation is a going, prosperous concern.”

It is said by learned counsel for respondents that Mr.

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Cook is a New York lawyer, and speaks, with reference to this point of view, of the statute in that state, there being no provision in the statute similar to our statute upon which the respondents rely. But the next announcement made by the author cannot be construed in any other light than an intention to announce the law to be opposed to the toleration and encouragement of deceitful devices, whereby the letter of the law is complied with and the spirit of the law violated, for he says:

"And certainly if the purpose of such dissolution is not the *bona fide* discontinuance of the business, but is the continuance of that business by another new corporation, then the rule is that a dissenting stockholder may prevent the sale, even though it is made with a view to dissolution of the corporation. This is the law as laid down in the well-considered case of *Kean v. Johnson*, 9 N. J. Eq. 401. Such a dissolution is practically a fraud on dissenting stockholders. It seeks to do indirectly what cannot legally be done directly."

And the cases cited by the author, while not decided under statutes similar to ours, all breathe the same determination to compel straightforward dealing on the part of corporations to whose care and management are intrusted the interests of their stockholders. And in this age, when the great volume of the business of the country is done, and must necessarily be done, by corporations, courts of equity must not relax their vigilance in protecting individual interests which, in the aggregate, constitute the interests of the corporation, and, in accordance with the time-honored rule, will strictly construe statutes which are in derogation of the common law.

The result of a successful practice such as is attempted here will be that minority stockholders will always be at the mercy of the majority. If the enterprise fails, they bear their proportion of the losses. If, on the other hand,

it succeeds, as soon as it passes the experimental stage, and the opportunity is presented to finally reap the reward of a judicious investment, they are coolly ejected from the corporation by a majority of the stockholders, who appropriate to themselves the accruing profits. In other words, they might be termed experimental dupes, who are subjected to the necessity of contributing to the losses, but denied the privilege of sharing the profits. The following pertinent language is used by the New Jersey court of chancery, in *Kean v. Johnson*, 9 N. J. Eq. 401. In answer to the contention that, under a certain provision of the law, a majority of the stockholders had the power to sell all the property of the concern and quit the business, and that the minority stockholders must be content with their proportionate share of the proceeds of the sale, the court said:

“On principle, this position seems to me unsound. If it be true, a minority is entirely in the power of a majority, and the moment a rich man or a few rich men see what they deem a better investment for their money than the corporation in which they are already stockholders, they may compel the poorer members of the company to abandon profits satisfactory to them, and either risk the little they have, according to views from which they differ, or take back their money to lie profitless on their hands, until they find another investment. Or, more nearly to approach the case in hand, as asserted by the complainants, if a rich man, or a number of rich men, possess a controlling interest in two roads whose termini meet—one already successful, the other not built, or needing nursing care—they may compel the poorer stockholders either to abandon or postpone the profitable use of their share of the capital, or take back their money and give up an investment which perhaps their own enterprise suggested, and their own perseverance recommended to the attention of others, and hazard the finding of a new investment, and a repetition of the same destruction of it. If such

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were the law, corporations would soon be few, for seldom would capitalists, whatever their comparative wealth, invest in enterprises so readily rendered profitless at the caprice, or in obedience to the interest of any man or set of men rich enough to control the majority of stock."

Vastly more unjust would it be to permit the small stockholder to be deprived of his profitable holdings by the practice upon him by a majority of a sort of legal legerdemain which, while it ostensibly dissolves the corporation, actually leaves it intact, with his interests eliminated.

The respondents, while insisting upon a literal construction of that portion of the section which permits the dissolution, declaim against the same character of construction of the latter part of the section, which provides that, before the application is granted, it must appear that all claims against the corporation are discharged. So that it will be seen that a literal construction of the section would prevent the dissolution of this incorporation under any circumstances.

But there seems to be no merit in the contention that one object of the disincorporation was that the outstanding securities might be drawn in and a larger bonded indebtedness secured; for there was nothing to prevent the corporation from retiring its present bonded indebtedness, for the owners of the stock owned the bonds, and the bond owners consented to release the mortgage on receipt of the cash, so that it was not necessary to reorganize for the purpose of paying for the old indebtedness and incurring a new one at a lower rate of interest; and, in fact, throughout the testimony, no legitimate reason seems to have been offered for the reorganization. On the other hand, it is apparent that the scheme was in the interests of the syndicate owning a majority of the stock, rather than in the interests of the corporation. Outside of other convincing testimony, this is made conclusive by the fol-

lowing excerpt from the testimony of Mr. Anderson, on cross-examination:

"Q. So you did not need a new company to have five per cent. bonds instead of six per cent., did you? A. I understand that, but I think probably we are not out here for philanthropy, and we would hardly reduce our rate to five per cent. if we were benefiting your client, Mr. Theis."

It is contended by the appellant, that there was no sufficient notice of the sale; that, as a result of such deficient notice, there was only one bidder, namely, Charles Reeves, who, as we have seen before, bid in the property as agent for Anderson, the agent of the syndicate. But, with the construction that we place upon the statute, it is not necessary to enter into a discussion of this proposition; for, believing from an examination of the record that there was no attempt at a bona fide dissolution of the corporation, such as is contemplated by the statute, the cause will be remanded with instructions to grant the relief prayed for.

FULLETON, C. J., HADLEY, ANDERS, and MOUNT, JJ., concur.

[No. 4859. Decided January 5, 1904.]

G. L. GAUDIE, *Respondent*, v. NORTHERN LUMBER CO.,
Appellant.¹

MASTER AND SERVANT—NEGLIGENCE—SAFE PLACE—PUSHING CAR OF LUMBER—INJURY TO SERVANT CAUGHT BETWEEN CARS—CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF RISKS—EVIDENCE—QUESTION FOR JURY. It is for the jury to pass upon questions of negligence, contributory negligence and assumption of risks, where the plaintiff was injured between two cars of lumber by reason

¹Reported in 74 Pac. 1009.

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of projecting sticks while assisting to push a car from the defendant's dry kiln, when it appears that the kiln was dark and it was difficult to see until after being inside some time, that the men were required to work rapidly on account of the excessive heat, and to look carefully where they stepped, that the sticks were longer than usual and not uniformly piled, and the plaintiff had not assisted in piling the lumber and would not have been injured if care had been exercised in piling the same, and the piling was done under the direction of defendant's foreman.

SAME—PILING LUMBER—FOREMAN A VICE-PRINCIPAL. In such a case, no question of fellow servants is involved, as the foreman under whose direction the lumber is piled is a vice-principal, charged with the master's duty in respect thereto.

SAME—WARNING—EVIDENCE IN REBUTTAL—CONTRADICTING CROSS-EXAMINATION OF PARTY'S OWN WITNESS. In an action for personal injuries, where the cross-examination of plaintiff's witness leaves the impression that plaintiff had been warned of the danger, it is proper to permit the plaintiff to testify in rebuttal that he had received no warning.

TRIAL—VERDICT—CONTRIBUTORY NEGLIGENCE—GENERAL VERDICT WHEN NOT INCONSISTENT WITH SPECIAL FINDING. A general verdict for plaintiff finding that he was not guilty of contributory negligence in pushing upon a car from the side, is not inconsistent with a special finding that he could have avoided the danger by going in front of or behind the car, since the special verdict did not find that the danger in working at the side was known or obvious.

SAME—A special finding must be irreconcilably inconsistent with the general verdict to warrant setting the latter aside.

Appeal from a judgment of the superior court for Snohomish county, Denney, J., entered July 27, 1903, upon the verdict of a jury rendered in favor of the plaintiff for \$5,000 for personal injuries. Affirmed.

Root, Palmer & Brown, for appellant.

Robert A. Hulbert, for respondent.

HADLEY, J.—This is an action for damages for injuries received by respondent while assisting to move a car of lumber in the drying kiln of appellant. Respondent's

regular work was in the lumber yard, but he was occasionally called, together with others, to assist in moving cars in the kiln. The cars were moved by men pulling and pushing them. The number of men called to move these cars varied, sometimes running as high as ten or twelve.

There were two tracks in this apartment of the dry kiln, and upon each of these stood kiln cars loaded with lumber. These tracks ran in a parallel direction, and there was sufficient space between the lumber of the cars on the respective tracks for one to pass safely, if no protruding obstruction interfered with the passage. One end of the kiln was entirely closed, while at the other end was an open space, about nineteen feet wide and nine or ten feet in height. There were no windows, and the only light entering the kiln came through this doorway. The cars upon one track, however, filled the kiln up to the open door, at the time of the accident, the lumber being piled upon the car standing at the door about nine feet in height, leaving about one foot above through which light could enter. Upon the other track no car stood at the door, but the first one was some distance back, thus leaving the entire space across that track—about one-half the width of that apartment of the kiln—open for the admission of light. There was no solid floor of the kiln, and when pushing or pulling a car the men were required to watch where they stepped, in order to avoid stepping upon the heated pipes or through holes leading into the basement below. The temperature of the air in the kiln was usually very high, and the men were required to move the cars quickly, in order to get out to cooler air where they could breathe freely.

At the time the accident happened to respondent, he was called in from the lumber yard to assist in moving

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the car which stood back from the door as above described. He passed in between that car and one on the adjoining track, and, stationing himself alongside the car, he began pushing. As the car proceeded, some protruding cross pieces, upon which the lumber was piled, caught respondent in such a manner that he was wedged between them. The movement of the car was stopped by the obstruction, and respondent alleges that he was seriously and permanently injured. It is alleged, that the lumber was piled upon the cars under the direction of appellant's foreman in a negligent and dangerous manner, in that the cross pieces projected into the space between the cars; that the kiln was dark and very hot; and that respondent and the other men were required to work very rapidly, in order to remove the car before they would become exhausted from the heat. Appellant, in its answer, pleads assumption of the risk and contributory negligence on the part of respondent. The cause was tried before a jury, and a verdict was returned against appellant in the sum of \$5,000. Appellant's motion for new trial was denied, judgment was entered for the amount of the verdict, and this appeal is from the judgment.

It is first assigned that the court erred in denying appellant's challenge to the sufficiency of the evidence, at the close of respondent's case, and again, after all the evidence was introduced. A careful reading of all the evidence satisfies us that the court did not err in denying the challenge. It was for the jury to say whether the conditions, detailed substantially as above, constituted negligence on the part of appellant, and the question of contributory negligence was also for the jury; since the evidence was certainly not such as could lead to but the one conclusion, in the minds of reasonable men, that respondent was guilty of contributory negligence. It is urged

that respondent could easily have seen the danger from the cross sticks, and that he should not have stopped between the cars to push. There was evidence to the effect, however, that the men were called to come quickly from the yard to the kiln, and that the work had to be done rapidly because of the excessive heat; that, upon coming hurriedly from the outside light, it was difficult to see within the kiln until one had been inside for some time; that, even with the half end open space hereinbefore described, which, in practical effect, admitted all the light which entered the kiln, it was difficult to see when one passed between and behind the cars; that, when pushing or pulling, the men necessarily bent forward, and that they were required to look carefully where they stepped in order to avoid stepping upon the heated pipes or through open spaces leading to the basement.

There was evidence that at least eight or ten men were engaged in moving this car, some of whom were pushing from behind, and others pulling in front; that men at the corners in front often obstructed the passage of light into the space between the cars; that about four men could push or pull to advantage from either end of the car; that another man was also pushing from the side at the time respondent was hurt; that it was not an uncommon occurrence for men to push from the side, and that it was often necessary to do so when ten or twelve men were engaged in moving a car. It is true, it was testified that it was usual to warn the men to look out for the sticks, and that respondent had assisted before and had heard such warning. It was also testified that it had theretofore been the custom to use projecting sticks, and that respondent knew that fact. He had not, however, assisted in piling the lumber. His work was elsewhere. He had been called to assist in moving cars perhaps seven or eight times be-

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fore, and he says the sticks upon this car were longer than usual. There was much testimony to the effect that there would have been no danger to respondent if the sticks had been of uniform length, and had not projected beyond the lumber.

Under such testimony, we think it was for the jury to pass upon the question of negligence, contributory negligence, and assumption of the risk, and that the court should not have said, as a matter of law, that respondent was not entitled to recover under the evidence, either at the close of his own case, or at the close of all the evidence. It is well settled that the master is charged with the duty of furnishing his servant with a reasonably safe place in which to work, and this court, in *Shannon v. Consolidated etc. Mining Co.*, 24 Wash. 119, 64 Pac. 169, said of that rule that it "impliedly says to him that there is no other danger in the place than such as is obvious and necessary." It was for the jury to say, in the case at bar, whether the danger was obvious under all the testimony as to the character of the light and the necessarily hurried movements of the men, as to the sticks being longer than usual, and the conditions requiring such particular care as to where the men stepped. That the danger was not necessary is sustained by much evidence which is to the effect that the lumber could easily have been piled with sticks of uniform length, not projecting, and that in that event there would have been no danger of the kind which respondent encountered. Where there is a safe way for a master to do a thing, it becomes a question for the jury whether the failure to pursue the safe way is the proximate cause of the injury. *Goe v. Northern Pac. R. Co.*, 30 Wash. 654, 71 Pac. 182.

We think there is no question of fellow servant seriously involved in the case. It sufficiently appears that the lum-

ber was piled under the direction of appellant's foreman, and, under his direction, respondent was called to assist in moving the car. The foreman was a vice-principal, within repeated holdings of this court; and if the lumber was negligently piled, and if that was the proximate cause of the injury, appellant itself, and not a fellow servant, became chargeable therewith.

It is assigned that the court erred in permitting respondent in rebuttal to contradict what one of his own witnesses had said about respondent's being warned as to the danger. A witness by the name of Cleveland, who testified for respondent, said, on cross-examination, that he had instructed the men who assisted in moving the cars to look out for the sticks, and that, in his opinion, respondent had heard such warnings. A Mr. Owen was afterwards called by appellant, and he testified that he had always instructed the men not to get between the cars and to be careful. Neither witness testified that respondent was directly and personally warned, but their testimony might have left such an inference with the jury. If respondent had received no such warning it was proper for the jury to be so informed. While Cleveland was called as respondent's witness, yet the testimony on the subject of a warning to respondent was brought out by appellant, and was properly matter of defense. Owen's testimony was introduced as a part of defendant's case. It certainly was competent to contradict in rebuttal any inference that might have been drawn from Owen's testimony; and, as the point made by Cleveland's testimony in cross-examination was no more than the expression of the witness's opinion that respondent had heard the warning along with others, we think it was not prejudicial error to permit respondent to testify that he received no warning.

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It is next urged that the court erred in denying appellant's motion for judgment notwithstanding the verdict. The motion is based upon a special finding of the jury in answer to an interrogatory. Several interrogatories were submitted, but only one answer can be urged as being in any degree inconsistent with the verdict. The interrogatory and the answer thereto were as follows:

"Could plaintiff have avoided the danger which injured him by pushing from behind the car or going in front?
Answer: Yes."

Section 5022, Bal. Code, provides as follows:

"When a special finding of facts shall be inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly."

Was this finding inconsistent with the general verdict? We think not. By the general verdict the jury found that the respondent was not guilty of contributory negligence, and by the special verdict they found that he could have escaped the injury by going in front of, or behind, the car. It was not found by the special verdict that he knew of the danger where he was, or that it was obvious. It would be easy for a jury in any case to specially find that an injured person might have escaped by taking some other course, but such a finding would not necessarily be inconsistent with the general finding that there was no contributory negligence.

"The mere fact that an employe is injured because of the way of performing a duty which he selected, when if he had selected the other way injury would have been avoided, does not conclusively show contributory negligence. The result is not the true test." 1 Bailey's Master and Servant, § 1122.

The test is, if a party selects a dangerous way to perform a duty when there is a safe way, whether he knows the way selected to be dangerous, or whether the danger is

apparent and obvious. *Tennessee Coal etc. Co. v. Herridon*, 100 Ala. 451, 14 South. 287. A special finding must be irreconcilably inconsistent with the general verdict before the latter can be set aside and the former substituted in its place. 2 Thompson on Trials, § 2691; *Woollen v. Wishmier*, 70 Ind. 108. For an interesting discussion of this principle see, also, *Chicago & N. W. R. Co. v. Dunleavy*, 129 Ill. 132, 22 N. E. 15. The court did not err in denying the motion for judgment notwithstanding the verdict.

Other errors are assigned upon instructions given, and upon the refusal to give a requested instruction. We think the criticized instructions correctly stated the law within our view of the case as already stated, and we believe it is unnecessary to discuss them. We fail to find any requested instructions in the record.

The judgment is affirmed.

FULLERTON, C. J., and ANDERS, DUNBAR, and MOUNT, JJ., concur.

[No. 4815. Decided January 6, 1904.]

J. EUGENE JORDAN *et al.*, Appellants, v. E. LOBE,
Respondent.¹

ARBITRATION—TIME FOR AWARD LIMITED. Where an agreement for an arbitration expressly limits the time within which the award is to be made, the power of the arbitrators expires at the end of the time limited unless the same is extended or waived.

SAME—WAIVER OR EXTENSION OF TIME LIMIT. Where, after the hearing on an arbitration in which the time for making an award was limited to twenty days, it was agreed that the award need not be considered until one of the arbitrators could go to Alaska and return, without anything being said about how long the

¹Reported in 74 Pac. 817.

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Citations of Counsel.

trip would take, and he returned two days before the time expired, but nothing was done to make the award until more than twenty days after such return, whereupon one of the parties served notice of a revocation of the arbitration, an award made thereafter is void, and the court is without jurisdiction to affirm it.

SAME—REVOCATION—NOTICE OF DECISION—EVIDENCE. If such notice of revocation was necessary prior to knowledge of the determination in order to avoid a waiver of the time limit by silence, such waiver will not be found unless established by a preponderance of the evidence when notice of revocation was given before the award was filed or definitely settled upon.

Appeal from an order of the superior court for King county, Morris, J., entered May 5, 1903, quashing an award made by a board of arbitration. Affirmed.

Allen, Allen & Stratton, for appellants. The effect of our statute is to make every submission a statutory arbitration. *Bridgman v. Bridgman*, 23 Mo. 272; *Tucker v. Allen*, 47 Mo. 488; *Cochran v. Bartle*, 91 Mo. 636, 3 S. W. 854. Upon a statutory arbitration the award can be set aside only for the causes specified in the statute. *Carlsley v. Lindsay*, 14 Cal. 390; *Patrick v. Batten*, 123 Mich. 203, 81 N. W. 1081; *Neely v. Buford*, 65 Mo. 448. Such is the effect of our own decisions. *Zindorf Const. Co. v. West American Co.*, 27 Wash. 31, 67 Pac. 374; *Skagit County v. Trowbridge*, 25 Wash. 140, 64 Pac. 901; *Van Horne v. Watrous*, 10 Wash. 525, 39 Pac. 136. Time is not of the essence of the contract, and without a showing of injury, delay will not vitiate the award. *Eifert v. Wolf*, 19 Ky. Law 507, 41 S. W. 6; *Patrick v. Batten*, *supra*. The time was extended with the consent of all parties. *Bachelder v. Wallace*, 1 Wash. Ter. 107; *Wood v. Tunnickliff*, 74 N. Y. 39. Even when time is made of the essence, a waiver of exact performance allows a reasonable time. *Distler v. Dabney*, 7 Wash. 431, 35 Pac.

138, 1119; *Thacker Wood & Mfg. Co. v. Mallory*, 27 Wash. 670, 68 Pac. 199; *Battelt v. Matot*, 58 Vt. 271, 5 Atl. 479; *Henderson Bridge Co. v. O'Conner*, 88 Ky. 303, 11 S. W. 18, 957; *Smith v. Corn*, 23 N. Y. Supp. 326. Objection to the postponement of the award should have been made at the time of its announcement. *Vandall v. Vandall*, 13 Iowa 247. A waiver will be inferred from the silence of a party. *In re Conner* (Cal.), 60 Pac. 862. Statutory arbitrations can not be revoked after the proceedings have begun. *Buckwalter v. Russell*, 119 Pa. St. 495, 13 Atl. 310; *Shroyer v. Bash*, 57 Ind. 349; *Bash v. Christian*, 77 Ind. 290; *Dexter v. Young*, 40 N. H. 130; *Carey v. Com'rs Montgomery County*, 19 Ohio 245. A common law arbitration can not be revoked by a party after receiving notice that the decision will likely be adverse to him. *Coon v. Allen*, 156 Mass. 113, 30 N. E. 83.

Leopold M. Stern and Piles, Donworth & Howe, for respondent. The statute does not exclude the right to arbitrate at common law, but the methods are distinct and cumulative. *Foust v. Hastings*, 66 Iowa 522, 24 N. W. 22; *McClelland v. Hammond*, 12 Colo. App. 82, 54 Pac. 538; *New York Lumber Co. v. Schnieder*, 119 N. Y. 475, 24 N. E. 4; *McCune v. Lytle*, 197 Pa. St. 404, 47 Atl. 190; *Burnside v. Whitney*, 21 N. Y. 148; *State v. Jackson*, 36 Ohio St. 281; *Galloway v. Gibson*, 51 Mich. 135, 16 N. W. 310; *Dockery v. Randolph*, (Tex.) 30 S. W. 270; *Powers v. Douglass*, 53 Vt. 471, 38 Am. Rep. 699; *Payne v. Crawford*, 97 Ala. 604, 11 South. 724. The submission not complying with the statute, the award can be sustained only in case it is a good award under a common law arbitration. *Franklin Min. Co. v. Pratt*, 101 Mass. 359; *Northwestern Guaranty Co. v. Channell*, 53 Minn. 269, 55 N. W. 121; *Barney v. Flower*, 27 Minn.

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403, 7 N. W. 823; *Gibson v. Burroughs*, 41 Mich. 713, 3 N. W. 200; *Burkland v. Johnson*, 50 Neb. 858, 70 N. W. 388; *Moody v. Nelson*, 60 Ill. 229; *Fink v. Fink*, 8 Iowa 313; *Holdridge v. Stowell*, 39 Minn. 360, 40 N. W. 259; *Burghardt v. Owen*, 13 Gray 300. The arbitrators' authority ceases at the end of the time limited in the agreement. *Bent v. Erie Telegraph Co.*, 144 Mass. 165, 10 N. E. 778; *Franklin Min. Co. v. Pratt*, 101 Mass. 359; *Custy v. City of Lowell*, 117 Mass. 78; *Abbott v. Dexter*, 6 Cush. 109; *Heath v. Tenney*, 3 Gray 381; *Ryan v. Dougherty*, 30 Cal. 219; *White v. Kemble*, 3 N. J. L. 53; *Burnam v. Burnam*, 6 Bush 389.

MOUNT, J.—In January, 1902, the appellants and respondent entered into the following contract of arbitration:

"MEMORANDUM OF AGREEMENT, made and entered into this — day of January, A. D. 1902, by and between J. Eugene Jordan, Histogenetic Medicine Co. and Sea Level Mining & Milling Co., first parties and E. Lobe, second party. WITNESSETH: That, whereas, disputes have arisen between first parties and second party which said parties desire to settle without any great litigation and by arbitration: It is therefore agreed:

"First. That said matters so in dispute shall be submitted to a board of arbitration consisting of three arbitrators, said board to be composed of Harris Lewis, selected by first parties, E. C. Neufelder, selected by the second party, and a third arbitrator to be selected by said Lewis and Neufelder.

"Second. The questions submitted to said board of arbitration and to be determined by them are the following, to wit: (1) How much, if anything, is due from second party to first parties on account of the stock of the Sea Level Mining & Milling Co., sold by second party in the state of California? (2) How much, if anything, is due from second party to first parties, or either of them, on account of stock of the Sea Level Mining & Milling

Co., sold by second party in the state of New York?
(3) How much, if anything, is due from second party to first parties, or either of them, on account of, or by reason of, certain gold ore specimens delivered by J. Eugene Jordan, one of the first parties, to second party, and which first parties claim have not been returned?

"Third. Immediately upon the signing of this agreement the said arbitrators, Lewis and Neufelder, shall proceed to agree upon a third arbitrator, who, with the said Lewis and Neufelder shall constitute the board of arbitration; and when said third member of said board shall have been selected as aforesaid, the said board shall immediately proceed to the determination of the questions heretofore submitted to them.

"For the purpose of determining said questions, said board shall have the right to examine witnesses and hear evidence and to take the course usually taken by courts of justice in determining questions of law and fact, and the decision of two of said arbitrators upon any questions hereinbefore submitted shall constitute the decision of the board and such decisions upon any and all of said questions shall be final, binding and conclusive upon the parties hereto. Said board of arbitration shall render its decision in writing within twenty days after said third arbitrator shall have been selected. Said decision shall be rendered in writing, signed by the arbitrators, or a majority of them, and a copy of said decision shall be given to each of the parties hereto immediately it shall have been rendered.

"In witness whereof the parties hereto have hereunto set their hands, the day and year herein first named."

Pursuant to this agreement, and on May 23, 1902, the arbitrators named therein agreed upon and appointed F. C. Johnstone as a third arbitrator. These arbitrators then immediately proceeded to hear evidence of the respective parties. When the evidence was closed, Mr. Johnstone announced to the parties that it was necessary for him to leave the state of Washington and go to Alaska, and that it would be impossible for him to consider the award until

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after his return. This was agreed to by all the parties. Johnstone thereupon left the state and returned on June 11, 1902. Nothing was done further in the case until about July 7, 1902, when Johnstone called upon respondent for certain books of account which he, Johnstone, desired to consult in determining the award. On July 10, 1902, respondent served on appellants a notice of revocation of the arbitration. Five days later, on July 15, two of the arbitrators, Mr. Lewis and Mr. Johnstone, filed with the clerk of the superior court their award in favor of the appellants.

Subsequently the respondent moved the superior court to quash the award, (1) because it was not made within the time limited by the agreement, and (2) because the court had no jurisdiction in the case. A number of exceptions to the award were also filed by respondent, alleging technical irregularities. Appellants thereupon filed answers to the exceptions, alleging that respondent had waived the alleged irregularities. In answer to the motion above referred to, appellants alleged,

"That when said Johnstone announced that it was necessary for him to go to Alaska, it was agreed between all the parties to said arbitration that they might make their award after his return, and that it was well understood that he could not return until the expiration of more than twenty days; that after his return the arbitrators took up the matter with the knowledge of said defendant [respondent], who made no objection thereto until after they had reached their conclusion as to what said award should be, and that he only objected when he learned that said award would be adverse to him."

The questions thus presented to the lower court appear to have been tried on affidavits. The court, upon the hearing, found that it was without jurisdiction to enter judgment upon the award, and therefore sustained re-

spondent's motion, and entered an order quashing the award.

A number of technical questions are argued in the briefs, but the controlling one, and the only one necessary to be decided here, is the question relating to the revocation of the authority of the arbitrators. Whether this agreement was a statutory contract or a common law contract is immaterial in this case, because it was a good and binding contract in either event, and, like other contracts entered into upon good and sufficient consideration, should be performed according to its terms. Under the statute, as well as under the common law, the parties were at liberty to agree upon such conditions as they desired, and it was the duty of the arbitrators to determine the cause "agreeably to the terms of the submission." Section 5104, Bal. Code. It was specially agreed between the parties that "said board of arbitrators shall render its decision in writing within twenty days after said third arbitrator shall have been selected." It is not necessary for us to inquire why this limitation was placed in the contract. The parties agreed to it, and thus limited the time within which the arbitrators were bound to make their award. The rule governing awards, where the time is fixed by the contract of submission, is stated in 3 Cyc., p. 631, as follows:

"Whenever by the terms of the submission, either at common law or under rule of court, the award is required to be made within a specified time, the authority of the arbitrators terminates upon the expiration of the time specified."

See, also, 2 Am. & Eng. Enc. Law (2d ed.), p. 696; *Ryan v. Dougherty*, 30 Cal. 218; *Conrad v. Johnson*, 20 Ind. 421; *Bent v. Erie Telegraph Co.*, 144 Mass. 165, 10 N. E. 778; *Burnam v. Burnam*, 6 Bush (Ky.) 389.

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The third arbitrator was selected on May 23, 1902. Under the rule above stated, the authority of the arbitrators to make an award in this case ceased on June 13, 1902, unless the time was extended, either by express stipulation or by waiver of the time limit. It is not contended that the time was extended by express stipulation; but it is alleged that the parties agreed that one of the arbitrators might go to Alaska, and that the award might be made after his return, "and that it was well understood that he could not return until after the expiration of more than twenty days."

The evidence is conflicting as to what was understood about the length of time Johnstone was to be gone. It nowhere appears in the record that there was any statement made by any one at any time as to how long the trip to Alaska would take Mr. Johnstone; but it is undisputed that he returned from Alaska "not later than June 11," which was at least one day within the time fixed by the agreement for the award to be made. The award was not made within the twenty days, nor for more than twenty days after his return. The record conclusively shows that none of the parties or the arbitrators took any steps, or paid any attention to the matter of arbitration, until July 7, 1902, at which time Mr. Johnstone called upon respondent for some books which he desired to consult in determining his award; and that three days thereafter, and before any award was filed, respondent served notice of revocation of the agreement.

If it may be conceded that silence shall be construed into an implied waiver of the time limit fixed by the parties, and that, therefore, it is necessary for a party, who desires to terminate the authority of arbitrators, to notify the other party of such desire before an award is made, in that event the appellants must fail because such notice

was given before the award was made or filed. To avoid this notice, however, it is argued that the respondent had knowledge of the award, and only objected when he learned that the award would be adverse to him.

We think the record fails to show that respondent knew what the award was to be, before he served his notice of revocation. It is true that three of the affidavits filed by the appellants state that prior to the 10th day of July, 1902, "the said E. Lobe well knew what the award of said arbitrators was to be, and well knew that they had agreed thereto." No facts are stated showing how or why he knew, or from whom he obtained this information. Mr. Lobe, however, says that he was told by Mr. Johnstone on July 7, 1902, that the award had not then been settled upon, and that on July 10 he did not know what the award was to be. Mr. Neufelder, one of the arbitrators, makes an affidavit in which he states "that on the 10th day of July, 1902, the award of the arbitrators had not yet been definitely settled upon; that while the general sentiment of the arbitrators was known among themselves, the exact amount which was to be awarded had not yet been agreed upon."

Upon the face of the record, the court appeared to be without jurisdiction to affirm the award, because it was made without the time agreed upon by the contract. If there had been a waiver of the time limit, it devolved upon appellants to show it by a preponderance of the evidence. The affidavits are not sufficient for that purpose. Upon any view of the case, we think the lower court was right in quashing the award.

The judgment is therefore affirmed.

FULLERTON, C. J., and DUNBAR, ANDERS, and HADLEY, J.J., concur.

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[No. 4723. Decided January 6, 1904.]

W. F. HANKLE, *Respondent*, v. LEWIS H. DENISON *et al.*,
Appellants.¹

SPECIFIC PERFORMANCE—CONTRACT TO SELL LAND—COMPLAINT—ALLEGATION OF OWNERSHIP. A complaint in an action for the specific performance of an agreement to convey land held under railroad contracts sufficiently alleges defendant's ownership by a general allegation of ownership, "as evidenced by contracts of sale" with the railroad company, and is not defective for failing to state that such contracts of sale were made with the defendant or were owned by him.

EVIDENCE—HEARSAY—ERROR CURED BY DIRECT TESTIMONY OF THE STATEMENT. It is harmless error to receive hearsay testimony of the statement of a party where such party afterwards confirmed the same by his own testimony.

EVIDENCE—HARMLESS ON TRIAL *de novo*. The erroneous admission of evidence is harmless where there is a trial *de novo* on appeal.

VENDOR AND PURCHASER—SPECIFIC PERFORMANCE—FINDINGS. Evidence held to warrant the finding that defendant in an action for the specific performance of a contract to convey land was the owner thereof and had placed the title in his daughter for the purpose of fraudulently concealing his ownership.

Appeal from a judgment of the superior court for Lincoln county, Neal, J., entered January 5, 1903, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, decreeing the specific performance of a contract to convey land, with \$500 damages for withholding the same. Affirmed.

S. C. Hyde and *Robert Tipton*, for appellants.

Myers & Warren, for respondent.

DUNBAR, J.—This action was brought by respondent against appellants for specific performance of the following contract and agreement:

¹Reported in 74 Pac. 822.

"This contract made and entered into by and between L. H. Denison, party of the first part, and W. F. Hankel, party of the second part, both of Wilbur, Lincoln county, Washington, WITNESSETH:

"Whereas said party of the first part has railroad contracts to, and is the owner of, Sec. 35, Tp. 24, R. 32, in Lincoln county, Washington, and desires to sell the same to said party of the second part for the agreed price of five thousand dollars, less the amount due on said contracts and the taxes, and the said second party hereby agrees to pay the said first party said sum for the transfer of said contracts to him, and said payment is to be made by said second party to said first party as follows, to wit: One hundred dollars to be paid by said second party as soon as this contract is signed, and the residue of said money is to be paid by said second party to said first party as soon as the transfer of said property is made to said second party and approved by the railroad company. Said second party hereby acknowledges himself to be justly indebted to said first party for the valid consideration in the sum above specified, and hereby agrees to pay the same as above specified. In witness whereof we have hereunto set our hands and seals this 26th day of December, 1901.

"L. H. Denison, party of the first part.

"W. F. Hankle, party of the second part."

The complaint alleges, the making of the contract; the payment of \$100 thereon; that plaintiff had been at all times ready and willing to pay the balance of \$4,900, less whatever was due to the railroad company upon said contracts, and the taxes thereon; and tendered in court said sum for that purpose; alleges, that the defendant had failed to procure and deliver to plaintiff an assignment of said railroad contracts; that defendant had wholly repudiated said contract; that said land, since making said contract, had enhanced in value and was of the value of \$6,400; prayed that the defendant be required to specifically perform said contract, and to procure and deliver to said plaintiff an assignment of said railway contracts; also, prayed

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judgment for \$500 damages for withholding the contract, and that, in case defendant was unable to comply with the terms of said contract, he then have judgment for the return of the money paid, and for damages in the sum of \$2,000.

A demurrer was interposed to the complaint, which was overruled. Defendant answered, denying that he was the owner of the land and the railroad contracts described in the complaint; admitted the making of the agreement; alleged that, at the time said contract was made, said land and railroad contracts were the property of the defendant's minor children, Louis and Oliver, and that the plaintiff knew this at the time of making said contract; denied that plaintiff was at any time unable to comply with his contract, and alleged that he failed and refused to comply with the same; and, for affirmative defense, alleged that his minor children owned the land, and did, at the time the contract sued on was made. Plaintiff, replying, denied the affirmative matter in the answer; and alleged that, if the railroad contracts were in the name of the minors, they had been so arranged for the defendant's convenience. The minors, Louis and Oliver Denison, by guardian, intervened, alleging their ownership of the land and praying that the title to the premises be adjudged in them and their title be quieted.

The court, among other things, found that, at the time of the execution of this contract and at all times since, the defendant was the owner of the real estate therein described; that, when the land was purchased from the Northern Pacific Railway Company, the contract was placed in the name of Ida F. Denison, the daughter of said defendant, who at that time was about sixteen years of age; that the \$100 had been paid by the plaintiff as alleged; that, at the time of the commencement of the

action and at all times since, the defendant had, and has had, possession of both the said contracts of purchase from the railway company; that the defendant wholly repudiated his contract of sale made with plaintiff; that, since the execution of the contract, the real estate had greatly enhanced in value, and was, at the time of the commencement of the action, of the value of \$9,600; that the defendant stated and covenanted that he was the owner of said real estate, and that plaintiff acted upon said statement and believed in good faith that said defendant was the owner thereof; that the minors, in truth and in fact, never had any interest whatever in said real estate and the contracts of purchase from said Northern Pacific Railroad Company; that said Ida F. Denison, the daughter of defendant, never had any interest whatsoever in said real estate, but that the same was placed in her name by the defendant for the sole purpose of hiding and protecting his ownership therein; that all the claims of said defendant in regard to the ownership of said land by said minors are false and untrue, and are a mere sham and pretense on the part of the said defendant in order to evade the said contract entered into with plaintiff; that, at all times since the purchase of said lands from the railway company, the defendant Denison has had sole and absolute control of the same, has paid all the taxes thereon himself, and has made no accounting whatsoever at any time to his said daughter Ida F. Denison; and concluded, from such findings, and other findings not specially mentioned, that plaintiff was entitled to a decree adjudging that the said defendant immediately deliver to him the said railway contracts covering the land set forth in the contract, and was entitled to a judgment against defendant for his damages in the sum of \$500, and for his costs and dis-

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bursements; and judgment was entered in accordance therewith. From this judgment this appeal is taken.

The first claim is that the court erred in overruling defendant's demurrer to the complaint. It is asserted that, in an action for specific performance, it is necessary to allege and prove ownership in the defendant; that the ownership in defendant alleged, if such, is evidenced by contracts of sale executed by the railway company; that there is no allegation that the contracts were made with the defendant, or that he was the owner of the same.

We think the demurrer was properly overruled. The first allegation of the complaint is that, on the 26th day of December, 1901, the defendant L. H. Denison was the owner of certain real estate described in the agreement hereinafter mentioned, the same being evidenced by contracts of sale with the Northern Pacific Railroad Company—a distinct allegation of the ownership which would have been sufficient without the concluding clause, "the same being evidenced by contracts of sale," etc. There can be no presumption, after the direct allegation of ownership, that the contracts, which are alleged to evidence the ownership, were not contracts entered into by the company with the defendant or with his assignor. The complaint is a plain statement of facts, and fully meets the requirements of the law, and the cases cited by appellant do not seem to us to have any application to the complaint in question.

The second assignment of error is that the court erred in permitting the plaintiff to testify that Martin told him that one of the contracts had been accepted and one had not, on the ground that such was hearsay testimony. Outside of the fact that the objection to the testimony was a general one, if error at all it is harmless, from the

fact that Martin himself afterwards confirmed the same by his own testimony.

The third and fourth assignments are to the effect that the court erred in admitting certain testimony. Even if this testimony was inadmissible, it would not be reversible error, for the cause is tried *de novo* by this court, and the testimony will not be considered if inadmissible. We think there was no error committed by the court in the admission or rejection of testimony in any respect.

The remaining errors assigned relate to the findings of fact. An investigation of this record satisfies us that the court was justified in reaching the conclusion that it did on the questions of fact, and that the rise in the value of the land was the cause of the refusal of the defendant to perform the contract which he had agreed to perform.

The judgment is affirmed.

FULLERTON, C. J., and HADLEY, ANDERS, and MOUNT, JJ., concur.

[No. 5031. Decided January 11, 1904.]

THE STATE OF WASHINGTON, *on the Relation of Oliver S. Young, Plaintiff*, v. JOHN C. DENNEY, *Judge of the Superior Court for Snohomish County, Defendant*.¹

CERTIORARI—APPOINTMENT OF GUARDIAN—REVIEW—ADEQUATE REMEDY BY APPEAL. A writ of certiorari will not be granted to review the action of the superior court in appointing a guardian without jurisdiction, since there is an adequate remedy by appeal, and the delays incident to appeals do not affect the adequacy of the remedy.

Application to the supreme court filed November 17, 1903, for a writ of certiorari to review an order of the

¹Reported in 74 Pac. 1021.

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Opinion Per Curiam.

superior court for Snohomish county, Denney, J., appointing a guardian for the relator. Writ denied.

Robert McMurchie, for relator.

PER CURIAM.—This is an original application in this court for a writ of certiorari directed to the superior court of Snohomish county and to the Honorable John C. Denney, the judge thereof. The affidavit of the relator states, that on the 17th day of November, 1903, the said court, through said judge, made an order appointing one W. P. Bell guardian of the person and estate of relator, the relator being at the time more than seventy-five years of age; that said Bell thereafter pretended to qualify as such guardian, and now claims to be the lawful guardian of the relator, and as such has possession of all of relator's funds, amounting to about \$3,000 in notes and securities; that no notice, citation, or process of any kind was ever issued out of said court in such proceeding, bringing, or seeking to bring, relator within the jurisdiction of said court; that no inquisition of any kind was ever held, and relator was at no time, during or since the pendency of the proceedings, personally or physically present before the court; that no evidence was offered touching the question of relator's competency or sanity, and in making such order said court acted wholly upon the petition of said Bell, including a certain paper attached thereto designated "Nomination of guardian," wherein relator purported to nominate said Bell as a suitable person to act as his guardian, and asked that he be appointed guardian of both relator's person and estate; that thereafter relator specially appeared in said proceeding and moved the court to vacate the order appointing said Bell guardian as aforesaid, upon the ground that the court had no jurisdiction of relator's person, or of the subject matter of

said proceeding, which motion was denied. Other facts are alleged in the affidavit, but the above statement essentially covers the necessary facts involved in this application.

It is urged that an appeal will not afford a sufficiently speedy and adequate remedy, for which reason review by certiorari is sought. It has been the uniform rule of this court to deny the writ of certiorari, and the other extraordinary writs of mandamus and prohibition, when it appeared that there was an adequate remedy by appeal. It has also been determined that the delays and annoyances incident to an appeal do not affect the adequacy thereof. *State ex rel. Nelson v. Superior Court*, 31 Wash. 32, 71 Pac. 601; *State ex rel. Carrau v. Superior Court*, 30 Wash. 700, 71 Pac. 648; *State ex rel. Vincent v. Benson*, 21 Wash. 571, 58 Pac. 1066; *State ex rel. Washington Dredging & Imp. Co. v. Moore*, 21 Wash. 629, 59 Pac. 505; *State ex rel. Hibbard v. Superior Court*, 21 Wash. 631, 59 Pac. 505; *State ex rel. Townsend Gas & Elec. Light Co. v. Superior Court*, 20 Wash. 502, 55 Pac. 933.

A clear remedy by appeal exists in favor of the relator, under subd. 7, § 6500, Bal. Code. Following the rule of the above cited cases, the writ is denied.

[No. 4805. Decided January 11, 1904.]

THE STATE OF WASHINGTON, *on the Relation of J. Z. Moore et al., as the Board of Regents of the State University, Plaintiff*, v. S. A. CALLVERT, *as Commissioner of Public Lands, Defendant*.

STATE SCHOOL LANDS—APPROPRIATION FOR USE OF UNIVERSITY—CONSTITUTIONALITY—LEGISLATIVE POLICY—CONSTRUCTION OF PUBLIC GRANT. LAWS of 1903, p. 137, § 1, and LAWS 1893, p. 299, § 9, as

¹Reported in 74 Pac. 1018.

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signing and directing the selection of 100,000 acres of state lands for the support of the state university, are not unconstitutional on the theory that inasmuch as § 14 of the Enabling Act makes a special provision of 42,080 acres for the university, the intent was to exclude it from the benefits of § 17, granting 200,000 acres for "state, charitable, educational and reformatory institutions;" since no educational institution is excluded from the benefits of said grant, and the amount that may be appropriated therefrom to the use of any one institution is a question of public policy, to be determined exclusively by the legislature.

Application for a writ of mandamus, filed in the supreme court September 10, 1903. Writ granted.

John H. Powell, for relators.

The Attorney General, for defendant.

DUNBAR, J.—This proceeding is brought to compel the commissioner of public lands to make the selection of university lands as required by the act of the legislature of 1903. Section 1 of said act, on page 137, is as follows:

"The commissioner of public lands is hereby authorized and directed to ascertain how much land granted to the state for university purposes, by section 14 of the enabling act, approved February 22, 1889, remains unsold, and to select from the lands granted to the state of Washington by section 17 of the said enabling act for state, charitable, educational, penal and reformatory institutions, 100,000 acres thereof, assigned for the support of the university of Washington by section 9 of the act of the legislature of the state of Washington, entitled 'An act providing for the location, construction and maintenance of the university of Washington, and making an appropriation therefor, and declaring an emergency,' approved March 4, 1893."

Section 9 above referred to is as follows:

"That 100,000 acres of the lands granted by section 17 of the enabling act, approved February 22, 1889, for state, charitable, educational, penal and reformatory institutions

are hereby assigned for the support of the university of Washington." Laws 1893, p. 299.

The constitutionality of § 1 of the act of 1903, and, incidentally, the constitutionality of § 9 of the act of 1893, is questioned by the commissioner, who denies the validity of those acts in so far as they provide for the selection of 100,000 acres of land of the lands granted to the state by § 17 of the enabling act. The substance of such contention is that it was the intention of congress to make the grant of 200,000 acres, provided for in § 17 of the enabling act, to those institutions which are not otherwise provided for; or, in other words, that the special provisions made for certain institutions negatived, by implication, the idea that the institutions so provided for should share in this general appropriation, and that therefore, inasmuch as § 14 of the enabling act grants seventy-two sections, or 42,080 acres, of land to the state for the purpose of a university, it follows that the university is excluded, by contemplation of law, from the benefits of the grant made in § 17.

But, in addition to the fact that the evident object and practical effect of the provision of § 14 was to confirm a prior grant made in 1854, it seems plain to us that no educational institution is excluded from the benefits of the grant in § 17. The grant is 200,000 acres for state, charitable, educational, penal, and reformatory institutions—essentially different from the grant to North and South Dakota, where, after the grants to special institutions are enumerated, the language is, "and for such other educational and charitable purposes as the legislature of said state may determine, 170,000 acres." There the institutions previously provided for are especially excluded from participating in the further grant of 170,000 acres by the use of the word "other," while no words of exclu-

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sion are used in the grant to the institutions of Washington.

It seems to us that the language used in § 17 is not susceptible of construction, and the fact that the legislature may have the power to appropriate to one institution more than its proportionate part of the grant, cannot affect the construction. This is a question of public policy, which must be determined exclusively by the legislature. And it cannot be discovered that what might, on first thought, be considered an unjust apportionment of the grant has any practical effect in any event. All these institutions are maintained by the state, and the grant is simply an asset in the hands of the state to aid it in maintaining them. The passage of the act being within the authority of the legislature, the writ will issue as prayed for.

FULLERTON, C. J., and HADLEY, ANDERS, and MOUNT, JJ., concur.

[No. 4861. Decided January 11, 1904.]

THE STATE OF WASHINGTON, *Appellant*, v. CITY OF
ABERDEEN, *Respondent*.¹

STATUTE OF LIMITATIONS—VESTED RIGHTS—RETROACTIVE EFFECT OF AMENDMENT—ACTION BY STATE—CLAIM AGAINST MUNICIPAL CORPORATIONS—MORAL OBLIGATIONS. It was competent for the legislature by Laws 1903, p. 26, to amend the statute of limitations (Bal. Code, § 4807) by providing that it shall never be pleaded to an action brought by or for the benefit of the state, in so far as the same affects moral claims against municipal corporations, although the statute had fully run prior to the amendment of the law, since a city is a subordinate subdivision of the state government and may be obligated to pay claims not strictly binding in law, if just and equitable in their character.

¹Reported in 74 Pac. 1022.

SAME—Query as to whether such amendment could be made retroactive in so far as it affects contractual obligations which involve private individuals.

SAME—LICENSE FEES DUE FROM CITY TO STATE. The claim of the state against a city for a percentage of the liquor license fees collected by the city as an incident to its police powers, and due under the law to the state, is a well grounded moral or equitable obligation although barred by the statute of limitations, and the bar may be removed by the legislature without violating vested rights or the constitutional prohibition against the taking of property without due process of law.

Appeal from an order of the superior court for Chehalis county, Irwin, J., entered September 26, 1903, sustaining a demurrer to one of plaintiff's causes of action, and from that part of the judgment thereupon entered dismissing said cause. Reversed.

The Attorney General, for appellant.

E. H. Fox, for respondent.

HADLEY, J.—The state of Washington instituted this action against the city of Aberdeen, a municipal corporation, to recover a balance alleged to be due the state from said municipality, on account of moneys received by it for the issuance of licenses to sell intoxicating liquors. The demand is made under and by virtue of the statute of 1888, as found in § 2934, Bal. Code, which provides that ten per cent of the annual liquor license fees, paid to the treasurer of an incorporated city or town, shall be paid into the general fund of the state treasury.

The complaint contains two causes of action. The first alleges that between the 3d day of June, 1890, and the 1st day of September, 1900, the city received, as fees for liquor licenses, the sum of \$39,552.05; all of which except the sum of \$350, paid to the state, it has converted to its own use. Judgment is demanded under the first cause of action for \$3,955.20, less \$350 paid as aforesaid,

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the sum demanded being the unpaid balance of ten per cent of the total collections during the period named. The second cause of action alleged that between the 31st day of August, 1900, and the 20th day of August, 1903, the city collected the sum of \$42,450; all of which it has converted to its own use, and judgment is demanded for \$4,245, being ten per cent of the amount collected within the last named period.

The city demurred to each cause of action on the ground that sufficient facts were not stated to authorize recovery; and, to the first cause of action, the additional ground of demurrer was interposed that the action was not commenced within the time limited by law. The demurrer was sustained as to the first cause of action, and overruled as to the second. Each party refused to plead further, and judgment was thereupon entered dismissing the first cause of action, and awarding recovery for the amount prayed under the second. The state has appealed from the order sustaining the demurrer as to the first cause of action.

The only question involved is, was the first cause of action barred by the statute of limitations when the suit was begun? Section 4807, Bal. Code, provides as follows:

"The limitations prescribed in this chapter shall apply to actions brought in the name of the state, or any county or other public corporation therein, or for its benefit, in the same manner as to actions by private parties. An action shall be deemed commenced when the complaint is filed."

The above statute was in effect prior to the time any of the collections were made by the respondent city, as set forth in the complaint, and it will be observed that, by the terms thereof, the limitation statutes were specially declared to apply to the state. Under the terms of that stat-

ute, at least, the principal portion of the amount sought to be recovered under the first cause of action was barred when this action was begun. But, by an act of the legislature of 1903, said section was amended. See Session Laws 1903, p. 26, § 1. The amending section is as follows:

"Section 35 of the code of civil procedure of Washington, 1881, the same being section 4807 of Ballinger's Annotated Codes and Statutes of Washington, shall be amended to read as follows: Section 35 (section 4807). The limitations prescribed in this act (chapter) shall apply to actions brought in the name or for the benefit of any county or other municipality or *quasi* municipality of the state, in the same manner as to actions brought by private parties: *Provided*, That there shall be no limitation to actions brought in the name or for the benefit of the state, and no claim of right predicated upon the lapse of time shall ever be asserted against the state: *And further provided*, That no previously existing statute of limitation shall be interposed as a defense to any action brought in the name of or for the benefit of the state, although such statute may have run and become fully operative as a defense prior to the adoption of this act, nor shall any cause of action against the state be predicated upon such a statute. An action shall be deemed commenced when the complaint is filed."

It will be seen that the new statute provides that there shall be no limitation to actions brought in the name, or for the benefit of, the state; and further, that no previously existing statute of limitation shall be interposed as a defense to an action brought for the benefit of the state, although such statute may have fully run prior to the adoption of the above amendment. Respondent contends that the retroactive features of said amendment violate the provisions of the federal and state constitutions that no person shall be deprived of property without due process of law. It is urged that the right to plead the statute of

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limitations, when it has once fully run, is a vested right, and that the act of 1903 is void because it takes away that right. On the other hand, appellant contends that the right to plead the statute in cases of obligations arising on contracts express or implied is merely a remedial one, which may be taken away even after the statute has fully run.

The leading case cited by appellant is *Campbell v. Holt*, 115 U. S. 620, 6 Sup. Ct. 209, 29 L. Ed. 483. That case holds that the repeal of a statute of limitation of actions on personal debts does not deprive a debtor of his property in violation of the Fourteenth Amendment to the constitution of the United States, although the right of action against him is already barred. The opinion discusses authorities and principles extensively, and clearly draws a distinction between vested rights in real and personal property which arise by lapse of time and adverse possession, thus acting upon title, and the right to plead the statute of limitations as against a mere personal obligation or debt arising out of a contract express or implied. The following cases cited also hold that the right to plead the statute of limitations as to debts is a mere remedial one and is not a vested property right: *Guiterman v. Wishon*, 21 Mont. 458, 54 Pac. 566; *Townsend v. Jemison*, 9 How. 407, 13 L. Ed. 194; *De Cordova v. Galveston*, 4 Tex. 470; *Lewis v. Davidson*, 51 Tex. 251; *Jones v. Jones*, 18 Ala. 248. See, also, 10 Rose's Notes on U. S. Rep., pp. 1174, 1175.

It must be conceded that there is substantial conflict of authority as to whether the right to plead the statute of limitations as to debts on contracts between private individuals comes within the classification of vested rights, so as to constitute it a property right, within the meaning of the constitutional provisions. Notwithstanding the fact

that as eminent a tribunal as the supreme court of the United States has held that it is not such, in *Campbell v. Holt*, *supra*, yet it will be observed by reference to page 1175 of Rose's Notes, cited above, that other courts have not followed that doctrine. See, also, *Dunbar v. Boston etc. R. Corp.*, 181 Mass. 383, 63 N. E. 916, in which Chief Justice Holmes distinguished the case then in hand from *Campbell v. Holt*, and said:

"As yet it is not necessary for us to choose between that decision and the weighty intimations to the contrary in this court and elsewhere."

In notes of Vol. 19, Am. & Eng. Enc. Law, (2d ed.) p. 171, will be found a list of cases cited as following *Campbell v. Holt*, and also an extended list as opposed to the doctrine of that case. While the argument in *Campbell v. Holt* is entitled to great weight, yet we believe the case at bar, like the Massachusetts case cited above, should be distinguished from it, and that we are not now called upon to approve or disapprove the doctrine of that case, as applied to the statute of limitations when interposed in a suit upon a contractual obligation which involves private individuals.

The obligation involved here is that of a municipal corporation to the state. A municipal corporation is a subordinate subdivision of the state government. It derives its existence, powers, and privileges from the state. The power to collect a liquor license tax was conferred by the state, as an incident to police powers pertaining to government. The city, therefore, became an agency of the state in collecting the money. In conferring the power, the state specifically provided what disposition should be made of the money when collected. Without doubt the legislature might have provided that all money so collected should be paid to the state, but, in its wisdom, it saw fit

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to require but a small portion of it to be so paid. That small portion has always belonged to the state, from the moment of its collection. The city was then under both legal and moral obligations to turn it over to the state. The moral obligation still existed when the statute of 1903 became a law, notwithstanding the bar against its enforcement, under the previously existing statute of limitation. The legal bar did not remove the moral obligation; the debt still existed.

The plenary powers of the legislature over municipalities of its own creation have been held to be greater than those pertaining to private corporations or individuals, and, in pursuance of the exercise of such powers, it has been held that the legislature may compel municipalities to pay debts or claims not strictly binding in law, but which are just and equitable in their character and involve a moral obligation. The principle is stated in 1 Dillon's *Munic. Corp.*, (4th ed.) § 75, as follows:

"The fact that a claim against a municipal or public corporation is not such an one as the law recognizes as of *legal obligation* has often been decided, by courts of the highest respectability and learning, to form no constitutional objection to the validity of a law imposing a tax and directing its payment; . . . The cases on this subject, when carefully examined, seem to the author to go no further, probably, than to assert the doctrine that it is competent for the legislature to compel municipal corporations to recognize and pay debts or claims not binding in strict law, and which, for technical reasons, could not be enforced in equity, but which, nevertheless, are just and equitable in their character, and involve a moral obligation. To this extent and with this limitation, the doctrine is unobjectionable in principle, and must be regarded as settled, although it asserts a measure of control over municipalities, in respect of their duties and liabilities, which probably does not exist as to private corporations and individuals."

A number of cases are cited by the author in support of the above, to some of which we shall here refer. In *New Orleans v. Clark*, 95 U. S. 644, 24 L. Ed. 521, it was held that it is competent for the legislature to impose upon a city the payment of claims, just in themselves, but which, for some irregularity in the proceedings creating them, can not be enforced at law. It was further held that a law requiring a municipal corporation to pay such a claim is not within the provision of the constitution of Louisiana inhibiting the passage of a retroactive law. In that opinion, at pages 654-5, Mr. Justice Field said:

"A city is only a political subdivision of the state, made for the convenient administration of the government. It is an instrumentality, with powers more or less enlarged, according to the requirements of the public, and which may be increased or repealed at the will of the legislature. In directing, therefore, a particular tax by such corporation, and the appropriation of the proceeds to some special municipal purpose, the legislature only exercises a power through its subordinate agent which it could exercise directly; and it does this only in another way when it directs such corporation to assume and pay a particular claim not legally binding for want of some formality in its creation, but for which the corporation has received an equivalent. . . . The constitution of Louisiana of 1868, which provides that no retroactive law shall be passed, does not forbid such legislation. A law requiring a municipal corporation to pay a demand which is without legal obligation, but which is equitable and just in itself, being founded upon a valuable consideration received by the corporation, is not a retroactive law,—no more so than an appropriation act providing for the payment of a pre-existing claim. The constitutional inhibition does not apply to legislation recognizing or affirming the binding obligation of the state, or of any of its subordinate agencies, with respect to past transactions. It is designed to prevent retrospective legislation injuriously affecting individuals, and thus protect vested rights from invasion."

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In *Sinton v. Ashbury*, 41 Cal. 525, 530, the court said:

"It is established by an overwhelming weight of authority, and, I believe, is conceded on all sides, that the legislature has the constitutional power to direct and control the affairs and property of a municipal corporation for *municipal purposes*, provided it does not impair the obligation of a contract, and by appropriate legislation may so control its affairs as ultimately to compel it, out of the funds in its treasury, or by taxation to be imposed for that purpose, to pay a demand, when properly established, which in good conscience it ought to pay, even though there be no legal liability to pay it."

See, also, *People ex rel. Blanding v. Burr*, 13 Cal. 343; *Creighton v. San Francisco*, 42 Cal. 446; *Grogan v. San Francisco*, 18 Cal. 590; *Town of Guilford v. The Board of Supervisors etc.*, 13 N. Y. 143; *Lycoming v. Union*, 15 Pa. St. 166; *Mayor etc. v. Sehner*, 37 Md. 180; *Commonwealth v. M'Gowan*, 4 Bibb. (Ky.) 62, 7 Am. Dec. 737.

In *Grogan v. San Francisco*, *supra*, the court said, at page 604:

"Thus, as a branch of the state government, the city levies taxes on her corporators for the use of the state. The money thus acquired is subject to the legislative control entirely."

So, in the case at bar, the money now demanded by the state was received by the city, a subordinate branch of the state government, under the direction and authority of the latter and for its use, and is therefore a subject of legislative control. It would be difficult to conceive of a more well grounded moral or equitable obligation than that of the city to pay this money to the state; and, within the principles discussed in the authorities hereinbefore mentioned, we think the state, through its legislature, had the power to say to its subordinate municipalities that what is morally and equitably due to the state shall become legally due. Such is the effect of the act of 1903, and it is there-

fore not void in its application to obligations of the municipalities to the state.

For the foregoing reasons, we hold that it was error to sustain the demurrer to the first cause of action. The judgment, in so far as it dismissed the first cause of action, is reversed, and the cause is remanded with instructions to overrule the demurrer, and enter judgment as demanded in the complaint.

FULLERTON, C. J., and MOUNT, ANDERS, and DUNBAR, JJ., concur.

[No. 4872. Decided January 11, 1904.]

EVERETT A. MORRISON, *Respondent*, v. NORTHERN PACIFIC RAILWAY COMPANY *et al.*, *Appellants*.¹

MASTER AND SERVANT—PARTIES—JOINDER IN ACTION FOR NEGLIGENCE OF SERVANT. An action for tortious negligence may be maintained jointly against a railroad company and the conductor of its train for injuries resulting from the negligent act of the conductor.

EVIDENCE—HARMLESS ERROR—RULE OF RAILROAD COMPANY—FACT OTHERWISE ESTABLISHED. The erroneous admission in evidence of a rule of a railroad company from which the jury would be led to believe that a conductor had the right to direct the movement of trains in passing, as senior conductor, is harmless where the conductor testifies on behalf of the party objecting that he had such right in any event from the position of the trains in question.

TRIAL—SPECIAL VERDICT—DISCRETION. The submission of special interrogatories to the jury is discretionary, and is not reviewable on appeal.

RAILROADS—NEGLIGENCE IN PASSING OF TRAINS—FELLOW SERVANTS—ENGINEER OR CONDUCTOR IN CHARGE OF THE MOVEMENT—INSTRUCTIONS. When a number of freight trains had orders to pass at a certain siding which was not long enough to hold the

¹Reported in 74 Pac. 1064.

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Citations of Counsel.

trains going in either direction, necessitating as claimed, that they "saw by," and a brakeman on an eastbound train is injured in a collision caused by the alleged negligence of the conductor on a westbound train in attempting such operation by running his train past the switch before the arrival of the second eastbound train; and it is claimed by the defendants that the engineer on the westbound train was responsible instead of the conductor in that he had control of the train, held:

(1) That an instruction that said westbound engineer was a fellow servant of plaintiff is properly refused on the theory that, if he was responsible in having the control of the operation of the trains in passing, he was a vice-principal.

(2) That the defendants' view of the law relative to the responsibilities of said engineer was given in any event by an instruction to the effect that the plaintiff could not recover in case said engineer had the right to direct the movement of the train and the collision was due to his negligence.

(3) That an instruction to the effect that the plaintiff could not recover if a flagman was sent out and the collision was due to the negligence of the eastbound engineer in failing to stop his train after being flagged, because there was no allegation of negligence on the part of the eastbound train crew, is favorable to the defendants and presents the case within the limitations established by the complaint.

VERDICT—DAMAGES FOR PERSONAL INJURIES—WHEN EXCESSIVE.
A verdict for \$12,500 for injuries sustained by a brakeman in a collision is excessive where there was no loss of limb or disfigurement, and no certainty of permanent injury, but only a weakness of the attachment of the tissue and muscles of the pelvic bone, which did not disqualify plaintiff from pursuing other callings which he had previously pursued; and the same should be set aside unless reduced to \$8,000.

Appeal from a judgment of the superior court for Spokane county, Belt, J., entered April 28, 1903, upon the verdict of a jury for \$12,500 damages for personal injuries sustained by a brakeman in a collision of freight trains in attempting to "saw by" a short siding. Affirmed on condition of remitting \$4,500.

Stephens & Bunn, for appellants, to the point that, the undisputed testimony having established that the east-

bound engineer could, by the exercise of ordinary care, have easily stopped his train in time to have avoided the collision after being flagged, his negligence was the proximate cause of the injury, cited: *Lynn Gas & Elec. Co. v. Meriden Fire Ins. Co.*, 158 Mass. 570, 33 N. E. 690, 20 L. R. A. 297, 35 Am. St. 540; *Hoover v. Beech Creek R. Co.*, 154 Pa. St. 362, 26 Atl. 315; *Evansville etc. R. Co. v. Tohill*, 143 Ind. 49, 41 N. E. 709, 42 N. E. 352; *Trewatha v. Buchanan etc. Min. Co.*, 96 Cal. 494, 28 Pac. 571, 31 Pac. 561; *Lutz v. Atlantic etc. R. Co.*, 6 N. M. 496, 30 Pac. 912, 53 Am. & Eng. R. R. Cases, 478; *Kansas etc. R. Co. v. Dye*, 70 Fed. 24; *Fowler v. Chicago etc. R. Co.*, 61 Wis. 159, 21 N. W. 40, 17 Am. & Eng. R. R. Cases 536; *Enright v. Toledo etc. R. Co.*, 93 Mich. 409, 53 N. W. 536; *Deming v. Merchants etc. Co.*, 90 Tenn. 306, 13 L. R. A. 518; *Pullman Palace Car Co. v. Laach*, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215.

Merritt & Merritt and *Barnes & Lattimer*, for respondent.

DUNBAR, J.—Action for personal damages by respondent, who was a brakeman on one of the appellant company's trains running between the cities of Spokane and Ellensburg. He was acting as brakeman on an eastbound train known as "Extra 144." There was another freight train just ahead of Extra 144, going east toward North Yakima. Freight train Extra 143, with two other freight trains, was going west toward Ellensburg. The appellant and defendant J. E. Deuster was the conductor of westbound train Extra 143. Train Extra 144, on which plaintiff and respondent was brakeman, had the right of track at passing points over train Extra 143 westbound.

These two trains were ordered to meet and pass each other at the siding at Selah station. The other eastbound

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train, Extra 146, which was just ahead of Extra 144, had similar orders regarding the meeting at Selah. This train stopped on the main line at that station. It had to stop there, for the reason that westbound freight Extra 143 had pulled into the siding at Selah before the arrival of the eastbound train, and had pulled up as far as possible towards the west switch, the other two westbound trains following on to the siding as far as they could go. Only a portion of one of them, however, could obtain footing on the siding. The other portion, and the third westbound freight train, "hung out" on the main line beyond the east switch. The siding was what is known as a sixty-car siding.

It is contended by the appellant that the first eastbound train was of such length that, when it came on the main line and stopped between the switches of the siding, the second eastbound train, upon which respondent was a brakeman, could not get in behind it on the main line between the switches so as to allow the westbound trains to pass out westwardly, and that it became necessary, in order that these trains might pass each other, to "saw by"—that is, before the arrival at Selah of the second eastbound train, the westbound trains would have to pull out on the main line westerly from the west switch, so as to allow the first eastbound train to pass before the second eastbound train arrived; and then, when the first eastbound train had passed, the westbound trains would back up easterly, and permit the second eastbound train to come in on to the main line and stand between the switches, when the westbound trains could proceed on their way, clearing the main track on the east so that the eastbound train could proceed on its way.

It is the respondent's contention, that there was no occasion for any "saw by," for the reason that there was room

on the main line opposite the siding for both of the eastbound trains; and that, if the conductor had waited until Extra 144 had come into the station, the way would have been cleared for the westbound trains; and that, even if this were not true, the way attempted was not the only way in which these trains could pass each other; but that, if they had waited until Extra 144, the second eastbound train, had arrived, the westbound trains could have proceeded as they did, allowing the first eastbound train to pass forward on to the main line east of the siding, then back on to the switch and establish the same position that they had in the first place until the second eastbound train, or Extra 144, would take its place upon the main track opposite the switch, when the westbound trains would proceed westward, leaving the main track on the east so that Extra 144 might have proceeded on its way.

Before the Extra 144 arrived, however, the westbound train started west, and had got on to the main line when Extra 144 came round a curve, collided with Extra 143, and, by reason of such collision, the plaintiff sustained the injuries complained of. In his action he joined, as defendant with the railway company, J. E. Deuster, who was conductor of the leading westbound train. The trial of the case resulted in a verdict for plaintiff in the sum of \$12,500, against both defendants, and both defendants appeal from such judgment.

The complaint alleges, that the defendant Deuster, by virtue of his being conductor of the westbound train, had charge and control thereof, and of all persons employed thereon; that, by the rules of the defendant company, Extra 144 eastbound had the superior right of passing points over westbound trains; that the westbound trains, or those in charge thereof, had knowledge of the schedule on which the eastbound train was running, and that it was

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their duty upon their arrival at Selah to clear the main track for the passing or meeting of eastbound trains; that said conductor Deuster negligently permitted his train, Extra 143 westbound, to run past the side track at the town of Selah, causing the collision before mentioned.

In response to a motion for a bill of particulars, in which motion the defendants required the respondent to state fully wherein the conductor, J. E. Deuster, on Extra 143 westbound, was careless and negligent, the respondent answered as follows: "Said defendant J. E. Deuster was careless and negligent in permitting his train to run by and proceed beyond said side track at the town of Selah, at the point where said collision occurred."

The respective separate answers of the defendant Deuster and the company denied that the conductor Deuster had complete control over train Extra 143; denied that he was wholly responsible for the movements of said train, and alleged that the engineer upon said train had complete control over the movements thereof, through the management of his engine; admitted that train Extra 143 ran past the side track for about one-eighth of a mile, and that it collided with train Extra 144 (the train upon which plaintiff was acting as brakeman); but alleged that it was necessary and proper at that time and place, and that it was good and proper railroading, then and there for Extra 143 to pass the said town of Selah for some distance, for the purpose of permitting the train which it would meet there to "saw by," proper signals having been given to Extra 144; that said trains could not pass each other in any other way; and the other ordinary allegations in an answer to a complaint of this character.

The defendants each demurred to the complaint for the reason that the same did not state facts sufficient to constitute a cause of action; that there was a misjoinder of

parties defendant; and that there was a misjoinder of causes of action; and the overruling of this demurrer by the court is the basis of the first assignment of errors; the appellants contending that there is a misjoinder of parties defendant—that the railroad company and the conductor could not be joined in the same action, under the rule announced by this court in *Clark v. Great Northern Railroad Co.*, 31 Wash. 658, 72 Pac. 477.

An examination of that case shows that it is not in point. That was an action for a breach of a carrier's contract to transport plaintiff as a passenger, and an action for a tort arising from the alleged unlawful use of excessive force in ejecting plaintiff from the train, and it was held that, under § 4942, Bal. Code (providing that the plaintiff may unite several causes of action in the same complaint when they arise out of contract express or implied, or injuries with or without force to the person), these causes of action could not be united, on the ground that actions *ex contractu* could not be united with actions *ex delicto*. So that it will be seen that the rule announced in this case has no bearing upon the questions at issue. This question was, however, brought squarely before this court in the case of *Howe v. Northern Pac. R. Co.*, 30 Wash. 569, 70 Pac. 1100, 60 L. R. A. 949, where, after an examination of the authorities, which were conceded to be somewhat conflicting, the court decided that an action for tortious negligence might be maintained against the master and his employee jointly, where the injury was caused by the act of the latter.

There is but one objection to the testimony made by appellants in this case, and that is expressed in assignment No. 7, viz: that the court erred in overruling the defendants' objection to the introduction of rule 309 in rebuttal. Rule 309 is as follows: "In case several trains

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meet at a station and it is found necessary to saw by or do other work, directions will be given in order to expedite preference train by senior conductor." The objection was based upon the assertion that the rule did not relate to any of the issues of the case, or to the circumstances which prevailed at the time of the collision; the contention being that the rule only applied to occasions where there was a preference train, and that the jury would conclude that Deuster, under the rules of the company, was the one to direct the action of the trains at the time and place in question, and that they were thereby very greatly prejudiced by the introduction of this rule. But, according to the testimony of the appellant Deuster himself, whether or not he was acting as senior conductor, he had a right to direct the operation of the trains. He testified [on page 80] that the condition of affairs at the Selah station was what is known in railroading as a "jack pot," and that, when it became necessary to "saw by," the man who occupied the position that he (appellant Deuster) did would have the right to say to conductors of the other trains what was to be done there with reference to "sawing by." So that it seems to us that the introduction of the rule under the circumstances was entirely harmless.

Certain special interrogatories were requested by the appellants to be submitted by the court to the jury, which were refused, and error is based upon such refusal. In addition to the fact that it seems to us that the evidence did not justify the submission of such interrogatories, this court has decided, in *Pencil v. Home Ins. Co.*, 3 Wash. 485, 28 Pac. 1031; *Bailey v. Tacoma Traction Co.*, 16 Wash. 48, 47 Pac. 241; and *Walker v. McNeill*, 17 Wash. 582, 50 Pac. 518, that the question of the submission to the jury of special interrogatories is addressed to the discretion of the trial court, and is not reviewable on appeal.

It is alleged also that the court erred in refusing to give instruction No. 2, requested by appellants, which was as follows:

"You are instructed that the engineer of train No. 143, which collided with the train upon which plaintiff was brakeman at the time and place of the accident, was a fellow servant of the plaintiff, and if you find from the evidence that the carelessness of the engineer of said train No. 143 caused the collision in which plaintiff was injured, then the plaintiff cannot recover and your verdict must be for the defendant Northern Pacific Railroad Company."

If the evidence established the fact that the engineer was in control of train No. 143 to such an extent that he was permitted to order its movements, then such control and direction would constitute him a vice-principal of the railroad company, for it is the controlling and directing power and authority which determines whether or not he is the *alter ego* of the company, rather than any particular name by which he is called; and, if he had such authority, then he would not be a fellow servant, and the company could not escape responsibility by pleading his acts. But, in any event, the law in relation to the powers and duties and responsibilities of the engineer was given by the court in its seventh instruction, in the following language:

"If you find from the evidence that the collision and consequent injury to the plaintiff was caused by the carelessness of the engineer of train No. 143 in pulling his train out on to the line just west of Selah station too close behind the flagman who had been sent out, and if you further find that the conductor of the train—that is, the defendant Deuster—did not order or signal such engineer to pull his train out when he did, and that if said conductor by reason of the belief that a flagman had been sent out ahead a proper distance, and the conductor Deuster, as conductor of train No. 143 under the rules and regulations of the company, had no authority to direct the engineer as

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to the movement of the train at that time, but that the engineer had a right under such rules and regulations to decide as to the movement of the train at that time, then you should find for the defendant."

So that it would seem that, even if the appellants' view of the law were correct, and that the defendant company's responsibilities could be transferred to the engineer by giving him powers and authority which are usually exercised by conductors, that view of the law was presented to the jury. And so with the other instructions asked by the appellants. All the instructions which properly stated the law were given by the court in another form.

The court in its sixth instruction stated the law favorably for the appellants when it said:

"If you find from the evidence that the engineer of train 144 was flagged just prior to the collision, and that after seeing such flag he could have by the exercise of ordinary care brought his train to a standstill before it collided with train 143; that is, if by using the air brakes and the means for stopping his train, he could have stopped it after being flagged and thus avoided the collision and consequent injury, and that after seeing the flag the engineer of train No. 144 carelessly and negligently failed to stop his train and this caused the collision and injury to plaintiff, and that such carelessness and negligence was the direct and proximate cause of the collision and injury, then the plaintiff cannot recover in this case, because there is no allegation or claim in the complaint that the injury to plaintiff was the result of the carelessness or negligence of the train crew of train Extra 144, but, as we have stated, the negligence charged is the negligence of the defendant Deuster, as conductor of train 143, in pulling his train on to the main track as alleged in the complaint."

So that the whole question of responsibility and proximate cause was presented to the jury under the limitations which had been established by the language of the complaint. And under the instructions of the court, which

were full and complete, all the other questions which are discussed by the appellants were settled by the jury.

There seems to be no merit in the assignments of error in relation to the manner in which the jury were instructed concerning the form of their required answer to special interrogatories, or in regard to the actions of the jurors in any respect.

It is earnestly contended, however, and we think with some justice, that the verdict in this case is excessive. There is no loss of limb and no disfiguration, the injury which was proven being an injury to the tissue and a weakness of the attachment of the muscles of the pelvic bone; the doctors who attended respondent being unable to testify that there was any permanent injury to the kidneys, and their testimony in relation to the permanency of the injury to the muscles was, to a great degree, speculative. There seems to be no certainty that the injury will be permanent, and, in any event, according to the testimony of respondent, he is still qualified to pursue other callings than that of a brakeman, which he testified he had pursued before. We think, under all the circumstances shown by the testimony, that \$12,500 is an excessive verdict, a result more from a consideration by the jury of the large amount sued for, viz., \$28,215, than from a consideration of the damage actually shown. We think that, under the testimony, considering the expense of medical treatment and the disability shown, \$8,000 would have been as large a verdict as should have been returned.

The judgment of this court is that, if, within thirty days from the filing of this opinion, the plaintiff remit from the judgment appealed from the sum of \$4,500, the judgment will be approved; otherwise it will be reversed.

FULLETON, C. J., and HADLEY, ANDERS, and MOUNT, JJ., concur.

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THE STATE OF WASHINGTON, *on the Relation of Frank Zenner, Plaintiff, v. J. A. GRAHAM, as Sheriff of Chehalis County, Defendant.*¹

HABEAS CORPUS—SUFFICIENCY OF INFORMATION—RULINGS ON, NOT REVIEWABLE. Rulings of the trial court upon the sufficiency of an information which do not go to the jurisdiction will not be inquired into in habeas corpus proceedings, since they are reviewable upon an appeal.

STATUTES—TITLE OF ACT—LIVING OFF EARNINGS OF PROSTITUTES. The subject of the act, Laws 1903, p. 230, making it a felony to live off the earnings of a prostitute, solicit sexual intercourse, or entice or receive a female child into a house of ill-fame for the purposes of prostitution, etc., is sufficiently set out in the title thereof, which is a complete index of the act, while it is only necessary to so state the general purpose and scope of the act that the subject is expressed therein.

SAME. The compiler's head lines are no part of the title of an act, and the act can not be restricted thereby.

CONSTITUTIONAL LAW—CLASS LEGISLATION—PROSTITUTION—DISCRIMINATION BETWEEN MALES AND FEMALES—LAWFULNESS OF ACT. Laws 1903, p. 230, making it unlawful for male persons to live off the earnings of prostitutes is not in conflict with the fourteenth amendment of the federal constitution because it discriminates between male and female persons, since the privileges and immunities referred to are such only as are lawful, and prostitution may be prohibited or restricted to any class and in any way without infringing constitutional provisions.

Application to the supreme court for a writ of habeas corpus, filed November 24, 1903. Writ denied.

W. H. Abel, for relator.

Sidney M. Heath, for defendant.

MOUNT, J.—Application for writ of habeas corpus. The petitioner was convicted in the superior court of

¹Reported in 74 Pac. 1058.

Chehalis county of the crime of living with, and accepting the earnings of, a prostitute. He was thereupon sentenced to a term of three years in the penitentiary. The prosecution was based on the act of March 16, Laws of 1903, p. 230. The petitioner alleges that this act is void by reason of the insufficiency of the title thereof, and because it is contrary to the fourteenth amendment of the constitution of the United States, and is class legislation. Petitioner's counsel, in his brief, argues that the information is insufficient for several reasons. We shall not discuss these questions because they do not go to the jurisdiction of the trial court. The rulings of the trial court in the trial of the case, if erroneous, cannot be reviewed in this proceeding. Such questions must be brought here in the regular way by appeal. *In re Nolan*, 21 Wash. 395, 58 Pac. 222, and cases cited; *In re Casey*, 27 Wash. 686, 68 Pac. 185.

Petitioner was informed against and convicted under the provisions of § 2 of the act of 1903, which is as follows:

"Any male person who lives with, or who lives off of, in whole or in part, or accepts any of the earnings of a prostitute, or connives in or solicits or attempts to solicit any male person or persons to have sexual intercourse, or cohabit with a prostitute, or who shall invite, direct or solicit any person to go to a house of ill-fame, for any immoral purpose; or any person who shall entice, decoy, place, take or receive any female child or person under the age of eighteen years, into any house of ill-fame or disorderly house, or any house, for the purpose of prostitution; or any person who, having in his or her custody or control such child, shall dispose of it to be so received, or to be received in or for any obscene, indecent or immoral purpose, exhibition or practice, shall be deemed guilty of a felony and upon conviction thereof shall be imprisoned in the penitentiary not less than one year nor more than five years, and fined in any sum not less than

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one thousand dollars nor more than five thousand dollars." The title to the act is as follows:

"An Act relating to husbands who connive at the prostitution of their wives and to persons who live off or accept the earnings of prostitutes, or solicit persons to go to houses of ill-fame for immoral purposes, or who permit or solicit females under eighteen years of age to enter any house of ill-fame, or other houses for immoral purposes, declaring the violation hereof a felony, and fixing a punishment."

The subject of this act is certainly expressed in the title, which clearly points out the general purpose and scope of the act. The purpose of the constitutional provision that the subject of the act shall be expressed in the title does not mean that the title shall be an index to the act, as this one is. It is only necessary that the title shall state the general purpose and scope of the act, so that, making every reasonable intendment in favor of the act, it may be said that the subject is expressed in the title. Black's Const. Law, (2d ed.) p. 329; Cooley's Const. Lim. (5th ed.) p. 173; Sutherland, Stat. Const., pp. 95, 96. No reason is advanced why this title is not sufficient. Counsel for petitioner has mistaken the compiler's head lines to the chapter for the title of the act, and argues that, because the head lines refer only to a "husband," the legislature had no right to make other persons not husbands amenable to the provisions of the act. But this argument is without force, because the compiler's head lines to the chapter are no part of the title of the act.

It is next argued that the act is in conflict with the fourteenth amendment of the federal constitution, and is class legislation, because it discriminates between male and female persons by making it a felony for a male person to live with, or off of, or to accept, the earnings of a prostitute, while a female may do these acts without criminal liability. The privileges and immunities referred to

by the fourteenth amendment are such as are lawful in their character. Prostitution is unlawful and against public policy and good morals, and is subject to police regulation, and the legislature may therefore restrict it to such classes, or prohibit it by such penalties, as may be deemed necessary, without infringing upon the constitutional provisions referred to. *State v. Considine*, 16 Wash. 358, 47 Pac. 755; *In re Considine*, 83 Fed. 157; *State v. Nichols*, 28 Wash. 628, 69 Pac. 372; *Seattle v. Barto*, 31 Wash. 141, 71 Pac. 735; *State v. Sharpless*, 31 Wash. 191, 71 Pac. 737.

The act is not unconstitutional, upon any of the grounds urged, and the writ is therefore denied.

FULLERTON, C. J., and HADLEY, ANDERS, and DUNBAR, JJ., concur.

[No. 4648. Decided January 11, 1904.]

*In the Matter of the Estate of MICHAEL LLOYD, Deceased.*¹

ELLEN LLOYD, *Appellant*, v. JOHN LLOYD, *Administrator*,
*Respondent.*¹

HOMESTEAD—EXEMPTION—ADMINISTRATOR'S APPLICATION TO SELL REAL ESTATE TO PAY DEBTS—SELECTION FROM HUSBAND'S SEPARATE PROPERTY—DESCENT OF HOMESTEAD—RIGHTS OF WIDOW. Where an administrator makes application to sell, for the purpose of paying the debts of the estate, the real estate occupied, but not selected, by the deceased as a homestead, alleging that the same was his separate property, and the widow attempts to select the same as a homestead after the death of the husband, and, contests the application, the separate character of the property is in issue and should be determined, since the widow can not select a permanent homestead from the unselected separate

¹Reported in 74 Pac. 1061.

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Citations of Counsel.

estate of her husband to the exclusion of the other heirs, but the same descends to the heirs at law, under Bal. Code, §§ 5246, 6219 and 6222.

SAME. While such matter is more properly determined upon the final distribution of the estate, the appellant's claim of a homestead in the premises makes it proper to determine the same upon the application to sell the real estate.

SAME—VALUE OF HOMESTEAD—PRIOR EX PARTE APPRAISEMENT NOT RES ADJUDICATA. Upon an administrator's application to sell the deceased husband's real estate to pay the debts of the estate, contested by the widow, who selected and claimed the same as a homestead, a prior ex parte appraisement of the same at \$2,000, and an order setting the same aside as the homestead of the widow and minor child during the administration are not *res adjudicata* of the value thereof or of the question of the exemption of the same from the debts of the estate.

SAME—SELECTION BY WIDOW—AMOUNT OF EXEMPTION—ORDER TO SELL REAL ESTATE TO PAY DEBTS WHERE VALUE OF HOMESTEAD IS \$3,000—CONTEST. Upon an application to sell all of the real estate of deceased to pay debts, which was separate property and which was occupied by him and is claimed by the widow as a homestead, it is proper to order the sale where the court finds upon ample testimony that it is of the value of \$3,000, since the selection and claim by the widow after the husband's death does not effect the exclusion of the creditors, regardless of the actual value, but the same descends to the heirs subject to the lawful rights of creditors and all parties interested, in the regular course of administration.

Appeal from order of the superior court for Skagit county, Joiner, J., entered December 17, 1902, upon findings of fact and conclusions of law rendered in favor of the administrator, after a hearing upon the merits upon his final account and petition to sell real estate to pay debts. Affirmed.

Martin J. Lund, for appellant, contended *inter alia*, that the widow may select a homestead from the separate property of the husband after his death. Bal. Code, §§ 5215, 5246, 6219; *McMillan v. Mau*, 1 Wash. 26, 23 Pac. 441; *In re Feas' Estate*, 30 Wash. 51, 70 Pac. 270; *Brooks v.*

Johns, 119 Ala. 412, 24 South. 345; *Keyes v. Cyrus*, 100 Cal. 322, 34 Pac. 722, 38 Am. St. 296; *Matter of Noah*, 73 Cal. 590, 15 Pac. 290, 2 Am. St. 834; *Kearney v. Kearney*, 72 Cal. 591, 15 Pac. 769; *Smith v. McDonald*, 95 N. C. 163; *Bridwell v. Bridwell*, 76 Ga. 627; *Matter of Armstrong*, 80 Cal. 71, 22 Pac. 79; *Matter of Lamb*, 95 Cal. 397, 30 Pac. 568; *Lord v. Lord*, 65 Cal. 84, 3 Pac. 96; *Mawson v. Mawson*, 50 Cal. 541.

Thomas Smith, for respondent.

PER CURIAM.—This is an appeal by Ellen Lloyd, widow of deceased Michael Lloyd, from an order made by the superior court of Skagit county on December 17th, 1902, for the sale of the real estate of deceased, on petition of John Lloyd, administrator of said estate. Michael Lloyd died intestate on July 1st, 1901, in Skagit county, leaving appellant, Ellen Lloyd, as his widow, and three sons by a former marriage, William, Leo, and Chester Lloyd, the latter being a minor. There was no issue of the marriage between deceased and appellant. The land in question was set over to deceased, prior to his marriage with appellant, by a decree of the superior court of Skagit county, entered in a divorce suit between his former wife and himself. At the time of the decease of Michael Lloyd, and for some time prior thereto, he and appellant occupied these premises as their home. No declaration of homestead therein was ever made and filed in the auditor's office of Skagit county, by either spouse, during the lifetime of Michael Lloyd.

On July 22nd, 1901, respondent, John Lloyd, was duly appointed administrator of such estate, and thereupon duly qualified in that behalf, and entered upon the duties of his trust. The personalty and realty of deceased were regularly inventoried and appraised. The appraisement of

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this real estate was fixed at \$2,000, which comprised all the realty of said estate. On the 20th day of January, 1902, the superior court made an order setting aside, as the home and homestead of appellant and minor Chester Lloyd, the possession of the above premises, during the administration of the estate, and also to appellant, an allowance of \$20 per month until the further order of the court.

On August 11th, 1902, the administrator, John Lloyd, filed his final account and petition for the sale of such real estate. Upon his final account and petition, notice and order to show cause issued October 1st, 1902, why such account should not be approved and the prayer of the petition be granted, and the time of the hearing thereof was set for November 10th, 1902. On that day the appellant and the children of deceased appeared, and filed their objections and answers, in writing, and were represented by counsel.

The appellant objected to the proposed sale of the real estate, alleging, that the same is her homestead, on which she resides with her three minor children, who are dependent on her for support; that said premises were regularly set aside by the court as her homestead; that the value thereof does not exceed \$2,000; that "said premises were, during the lifetime of said deceased, his home and the home of his family, and, as such, were exempt from execution;" that there is a mortgage thereon for \$350, with interest and taxes due. She prayed that the petition to sell be denied, and that the administrator be ordered to pay the mortgage indebtedness and taxes as preferred claims.

Witnesses were examined, and the court heard other evidence. It appeared, that the children, to whom appellant referred, were hers by a former deceased husband; that

the claims on the mortgage indebtedness and for taxes had not been filed, or presented to the administrator, or to the court. Testimony was also heard as to the condition of the estate, the value and situation of this real estate, the items and allegations in the final account and petition, and with reference to appellant's objections. There is attached to the statement of facts a copy of a written declaration of homestead of the above premises, filed in the county auditor's office of Skagit county January 20, 1902.

On December 17, 1902, the court made its findings of fact and conclusions of law in the above matter, finding, among other things, that this real estate can be sold for, and is of the value of, about \$3,000, and consists of farming land, containing about 63 acres; that the personalty had been exhausted in the course of administration; that there were outstanding claims against the estate amounting to \$221.91, besides the mortgage debt of \$350, and interest, and about \$100 unpaid taxes on this realty, and certain costs and expenses connected with the administration and settlement of the estate; that there was only a balance of \$289.50 in the hands of the administrator with which to liquidate these demands, taxes, and expenses; that the realty was the separate property of deceased, and was all that remained for such purposes. An order was made and entered of that date approving the account of the administrator, and directing him to sell the realty at public auction.

The appellant's counsel makes two contentions in his brief: (1) That the court erred in forcing the appellant to litigate the question as to whether this real estate was the separate property of deceased, or the community property of the estate; and (2) that this realty was the homestead of appellant and her family, and the court erred in granting the order of sale. The transcript shows that

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there was a direct allegation in the petition that this real estate was the separate property of deceased, which the appellant contested by her written objections. Such issue having been tendered, the superior court was required to pass upon that question. The facts and testimony which appear in the record amply justify the finding that it was the separate property of the deceased. The appraisement and valuation of the realty at \$2,000, and the granting of the widow and the minor child of deceased the possession during the progress of the administration of the estate, did not have the force or effect of *res adjudicata*, so as to estop the administrator from proceeding, under the direction of the court, to sell this property in order to subserve the best interests of the estate and all the parties interested therein, according to the provisions of the statute in such cases. The most that appellant could claim, in any event, was the possession of the premises for herself and Chester, the minor, until the final settlement of the estate. The court could not, and evidently did not, intend, on a mere *ex parte* application, to make a final determination as to the title or homestead feature of the property in question, to the prejudice of the other heirs and the creditors of the estate.

In *In re Kruger's Estate*, 55 Pac. 1056, the supreme court of California, in considering the question of orders made in probate proceedings, on *ex parte* applications, by which the property and rights of the parties interested in an estate are affected, uses this language: "It cannot require the citation of authority in support of the proposition that one may not thus be deprived of his property without process of law." The appraisement of this realty was, at most, only *prima facie* evidence of its value. The evidence adduced at the hearing on the petition was amply sufficient to justify the finding of the court that the value of this real

estate was about \$3,000. This issue was squarely presented for the court's determination at this hearing. The appellant made no objection as to the method of procedure regarding such finding, and is, therefore, in no position to complain of the court's action in that regard.

The case of *Austin v. Clifford*, 24 Wash. 172, 64 Pac. 155, was, in some respects, similar to the matter at bar, except there was no question as to the rights of creditors of the estate presented to the court. The court held, in the matter of the distribution of the real estate, that, under the provisions of §§ 6219 and 6222, taken in connection with §5246 of Bal. Code, the widow for herself and minor child could not claim any permanent homestead in the premises which was the separate property of the deceased husband at the time of his death; that the realty vested in the heirs at law of decedent. The court remarked, regarding the interpretation of these sections: "They exempt such homestead from the payment of any debts, whether community or individual, and authorize the court to set aside the use thereof, for a limited period, to the family of deceased." This language was used with reference to the facts of the particular case decided. The court held that the widow could not lawfully claim the fee in the homestead, "irrespective of the claims of other heirs."

The children of decedent, Michael Lloyd, are making claims to this property adverse to the contentions of appellant. Ordinarily such issues would properly arise when the question of the distribution shall come up in the regular course of administration, but as they seem to be so inseparably interwoven with appellant's homestead claim in the premises, on the hearing of this appeal, at the risk of anticipating, we feel impelled to consider some of their features in this connection. The logic of the opinion in the case of *Austin v. Clifford*, *supra*, shows plainly that, under the

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facts as stated therein, the widow had no permanent homestead rights or estate in the deceased husband's property; that it descended to his heirs at law, including the widow.

Applying this rule to the proceedings at bar, it must necessarily follow that the realty in question, on the death of Michael Lloyd, vested in his lawful heirs, subject to the lawful rights and claims of creditors, and all parties interested, in the regular course of administration. See, further, *Stewin v. Thrift*, 30 Wash. 36, 70 Pac. 116. If the contentions of appellant's counsel be correct, no matter how valuable the homestead of decedent may be, it must go to his widow or children, to the exclusion of the rights of his creditors. This would have the effect of enlarging the homestead rights of the widow and children, by reason of the death of the husband. We cannot give our statutes on this subject any such forced construction. The filing of appellant's homestead declaration after the death of her husband can have no such effect. Section 5246, *supra*, refers to the selection of the homestead, made prior to the death of either spouse.

The cases from California cited *contra* have no application. The statute of the state provides, if no homestead has been selected, designated, and recorded during the lifetime of the deceased, "the court must select, designate, and set apart, and cause to be recorded, a homestead for the use of the surviving husband or wife, and the minor children, . . . out of the common property, or if there be no common property, then out of the real estate belonging to the deceased." There is no such provision in our laws. The authorities from other states, to which we have been referred by appellant's counsel, seem to fall in the same class as the California decisions, and show that the right to a permanent homestead can only exist in, and be set apart from, the deceased husband's or wife's separate prop-

erty when no selection shall have been made in the lifetime of the deceased spouse, by a court exercising probate powers and jurisdiction under some statutory enactment conferring such authority, which is wanting in the proceedings at bar.

No reversible error appearing in the record, the order appealed from must be affirmed, and it is so ordered.

[No. 4782. Decided January 11, 1904.]

HEBER N. TILDEN, *Respondent*, v. GORDON & COMPANY,
Appellant.¹

APPEAL AND ERROR—TRIAL—EVIDENCE—HARMLESS ERROR ON TRIAL *de novo*. It is not error for the trial court where a jury is waived, to receive evidence subject to objection, and make up findings without announcing any ruling thereon, since the cause is tried *de novo* on appeal and reversed only for the rejection of proper testimony, improper testimony being disregarded.

SAME. In a cause tried by a court without a jury, the fact that witnesses undertook to give reasons in support of positive statements, is not objectionable, where they can be separated.

SALES—MADE THROUGH BROKER—ACTION BY DEALER AGAINST PURCHASER. Where merchandise was ordered through a broker, knowing that he would secure it from a dealer, the transaction, when completed, is a purchase direct from the dealer, who may maintain an action against the purchaser.

NOVATION—SUBSTITUTION NECESSARY—SALE OF PERISHABLE GOODS WITHOUT WAIVER OF RIGHTS. Where perishable merchandise shipped to the dealer was rejected on account of quality, and the seller refused to accept a return of the goods, an agreement, pending the settlement, that the same might be sold at the best price obtainable, without waiving the rights of either party, is not a novation, since there is no substitution of one obligation for another.

TENDER—WHEN UNCONDITIONAL—ACCEPTANCE NOT AN ABANDONMENT OF PLAINTIFF'S ACTION—COSTS. A conditional tender of

¹Reported in 74 Pac. 1016.

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money by defendant in full satisfaction of a claim, is waived by bringing the same into court without condition, and its acceptance by plaintiffs, while so unconditionally tendered, does not waive any rights, and cannot be pleaded in a supplemental answer as an abandonment of the right of action, since the tender only affects the question of costs.

Appeal from a judgment of the superior court for King county, Emory, J., entered November 11, 1902, after a trial upon the merits before the court, a jury being waived, upon findings in favor of the plaintiff in an action for the price of goods sold and delivered. Affirmed.

Byers & Byers, for appellant.

Emmons & Emmons and *H. J. Granger*, for respondent.

FULLERTON, C. J.—The respondent, plaintiff below, brought this action against the appellant to recover the sum of \$389.39, alleged to be due for potatoes sold and delivered by him to the appellant, and the further sum of \$42.25, alleged to be due on a balance of account for a certain sale of goods. The cause was originally tried by the court and a jury, and resulted in a verdict and judgment for the respondent for a part of the amount claimed to be due. This judgment was reversed by this court in *Tilden v. Gordon & Company*, 25 Wash. 593, 66 Pac. 50, and the cause remanded for a new trial. After the remittitur went down, the appellant obtained leave and filed a supplemental answer, the contents of which will be stated later on. Issue was taken on this supplemental answer, and a trial had before the court without a jury, resulting in a judgment for the full amount claimed, less the amount of \$42.25, which had been paid subsequent to the commencement of the action.

The evidence of the respondent consisted, in part, of depositions, taken upon written interrogatories, pursuant to a stipulation entered into between the parties. When

these depositions were offered in evidence, the appellant objected to certain of the answers contained therein, on grounds deemed by it sufficient, and moved that the same be stricken therefrom. This motion the court refused to grant, the judge saying that he would not consider, in making up his findings, such of the answers as he deemed inadmissible as evidence; but at no time did he point out to the appellant such of the answers, if any there were, that he deemed thus inadmissible. Counsel argue that the appellant was entitled to know just what evidence was affecting the mind of the court, and that the failure of the court to announce its ruling on the motion was error. Counsel have not, however, made it clear just how their position on this appeal would have been in any way changed had the trial judge announced that he either sustained or denied the motion, nor are we able to understand how such a ruling would have in any way affected their client.

By statute (Bal. Code, § 6520) it is provided that in all "actions legal or equitable, tried by the court below without a jury, wherein a statement of facts or bill of exceptions shall have been certified, the evidence of facts shown by such bill of exceptions or statement of facts shall be examined by the supreme court *de novo*, so far as the findings of fact or a refusal to make findings based thereon shall have been excepted to, and the cause shall be determined by the record on appeal, including such exceptions or statement." This means that this court shall try *de novo* all questions of fact, where the evidence has been preserved and the trial court's findings have been excepted to. This court must, therefore, determine for itself what evidence is, or is not, admissible, regardless of the conclusions thereon of the trial judge. If it finds that proper evidence has been rejected, it will, of course,

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send the case back for a rehearing with instructions to admit the rejected evidence. But if improper evidence has been received and considered by the trial court, and an erroneous judgment entered, it will simply disregard the improper evidence in making up its judgment, and direct the proper judgment to be entered. Whether or not, therefore, the trial court errs in admitting or considering evidence is never a live question on appeal in cases triable *de novo* in the appellate court. The question there is, has a correct judgment been entered on the evidence properly before the court? And to merely show that erroneous evidence was admitted, avails nothing.

What is more to the purpose, however, the appellant argues in this same connection that, if the evidence objected to be not considered, there is nothing to support the court's finding of fact to the effect that the appellant purchased the potatoes in question from the respondent. It is not disputed that the question, from whom were the potatoes purchased? was one of the principal issues of the case, and that evidence upon the question was admissible. But it is contended that, because some of the witnesses undertook to give reasons in support of their positive statements, such statements must be rejected. The rule is not so sweeping as this. If the positive statements and arguments can be separated, even though the same may be intermingled in one answer, the positive statements are entitled to be considered, and especially is this the rule where a cause is being tried by a court without a jury.

As to the weight of the evidence on this point, we think the trial court correctly found it to be with the respondent. The transaction was a very common one. The respondent ordered, through a broker, a certain quantity of potatoes, knowing that the broker had none to sell, and

expecting him to purchase them from some dealer who had them. Such a transaction, when completed, is a purchase by the person ordering the potatoes, from the dealer and not from the broker, and the dealer may maintain an action directly against the person ordering them, and to whom they are delivered, for the purchase price.

It is next contended that the court erred in refusing to find that there had been a novation of the contract. The potatoes were purchased in San Francisco, and shipped by steamer to Seattle. When they arrived at Seattle, the purchaser examined them and refused to accept them, contending they were not such potatoes as it had ordered. The respondent refused to acknowledge the appellant's right to reject the potatoes, or accept a return of them. The parties thereupon agreed that the appellant might sell them for the best price obtainable, stipulating specially that such agreement should not be deemed a waiver by either party of his or its rights under the original contract. It is this agreement that is now contended to be a novation of the original contract; but, plainly, it is not so. A novation is the substitution of one obligation for another. Here there was no such substitution. The parties made no new contract, which was to take the place of the original one; the new contract was with reference to a collateral matter, and for the purpose of minimizing, as far as possible, the loss of that party who should be determined to be in the wrong, when the dispute concerning the original contract should be settled.

After the appellant had sold the potatoes, pursuant to the agreement last mentioned, it tendered the amount received to the respondent, who refused to receive it. When it answered to the complaint, the appellant brought the money into court, and again renewed its tender. These tenders, so far as the answer made it appear, were uncon-

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ditional, and, on the appellant's theory of the case, could not consistently have been otherwise; as it was then disclaiming ownership of, or any rights in, the potatoes, and any money it received from their sale would, as a matter of course, belong to the respondent. While the pleadings were in this condition, and after he had obtained judgment in the court below, and prior to any appeal being taken therefrom, the respondent obtained an *ex parte* order of the court permitting it, and withdrew the money so deposited. On the reversal of the judgment by this court, the appellant obtained leave and filed a supplemental answer, setting up the fact that the respondent had withdrawn from the registry of the court the tender it had theretofore made; and averred that the tender had been made conditionally—that is, in full satisfaction of any demand, growing out of the transaction concerning the potatoes, that the respondent might have against it; and demanded that the respondent be held to be estopped from a further prosecution of his action.

The trial court held the tender to have been made unconditionally, and this holding is assigned as error. We think, however, that the ruling of the court was right. Whatever may have been the condition attached to the tender, when it was first made and refused, such condition was waived when the appellant brought the money into court and tendered it unconditionally. So long as the money remained in the registry of the court under a tender without condition, the respondent could take it as his own without waiving any of his claims, and his acceptance of it, before it was withdrawn, did not effect an abandonment of his right of action for the difference between the amount received and the amount claimed. An unconditional tender simply affects the right to recover cost. If the plaintiff recovers no more than the

tender, he is not entitled to costs, but he has the tender at all events. It is needless to add that the appellant could not make an unconditional tender, and then, after it had been accepted, convert the tender into a conditional one.

The contention concerning the allowance of interest was determined adversely to the appellant by this court in *Edison Gen. El. Co. v. Canadian Pac. Nav. Co.*, 8 Wash. 370, 377, 36 Pac. 260, 24 L. R. A. 315, 40 Am. St. 910.

The judgment appealed from is affirmed.

HADLEY, ANDERS, MOUNT, and DUNBAR, JJ., concur.

[No. 4749. Decided January 11, 1904.]

MARIA McKNIGHT *et al.*, Appellants, v. E. A. McDONALD *et al.*, Respondents.¹

COMMUNITY PROPERTY—STATUTES—TITLE—AGREEMENT TO TAKE EFFECT UPON DEATH. An act entitled "An act relating to and defining the property rights of husband and wife" is sufficient to support the provisions of §4492 Bal. Code, authorizing an agreement between husband and wife passing the title to community realty to the survivor upon the death of either spouse, since it need not be an index of the act, and such provision is germane thereto.

SAME—AGREEMENT TAKING EFFECT UPON DEATH NOT A WILL—GENERAL PROVISIONS YIELD TO SUBSEQUENT SPECIAL ONES. Said act is not open to the objection that it refers to the construction of wills and repeals Bal. Code § 4601, since such an agreement is not a will and is not governed by the law relating to wills; and if it were, the general provisions would yield to this subsequent special one.

Appeal from a judgment of the superior court for King county, Tallman, J., entered December 18, 1902, upon an

¹Reported in 74 Pac. 1060.

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Opinion Per MOUNT, J.

agreed statement of facts, dismissing an action to recover an interest in real property. Affirmed.

Frederick R. Burch and *R. H. Lindsay*, for appellants, contended, among other things, that the instrument, although in form a deed, is a will, since the intent was that it should not take effect until after the death of the grantor. *Wren v. Coffey* (Texas), 26 S. W. 142; *Carlton v. Cameron*, 54 Tex. 77; *Reed v. Hazleton*, 37 Kan. 321, 15 Pac. 177; *Evans v. Smith*, 28 Ga. 98, 73 Am. Dec. 751; *In re Diez*, 50 N. Y. 88; *Lewis v. Scofield*, 26 Conn. 452, 68 Am. Dec. 404; *March v. Huyter*, 50 Tex. 243; *Wyche v. Clapp*, 43 Tex. 543.

S. D. King, for respondents.

MOUNT, J.—On the 30th day of December, 1886, James Burke and Eliza Burke, husband and wife, were the owners of the north forty feet of lot 9, in block 28, of Bell & Denny's First Addition to Seattle. This lot was unimproved community property. On that day the said James Burke and wife entered into the following agreement:

"This agreement made and entered into this 30th day of December, A. D., 1886, by and between James Burke and Eliza Burke, husband and wife, residing at the city of Seattle, in King county, Washington Territory, Witnesseth:

"That whereas said James Burke and Eliza Burke are owners of certain real property described as follows, to-wit: forty (40) feet front by one hundred and twenty (120) feet deep, on the north line of lot nine (9) in block twenty-eight (28), Bell & Denny's First Addition to Seattle, in King county, W. T., the same being the north two-thirds of said lot, and fronting on Front street in said city, the same being now held in the name of said James Burke, and being desirous that said property shall pass without delay or expense in case of the death of either of said parties, to the survivor;

"Now, therefore, in consideration of the love and affection that each of said parties has for the other, it is hereby agreed that in case of the death of said James Burke while said Eliza Burke survives, the whole of said property hereinbefore described, together with any other property by them hereafter acquired, shall at once vest in said Eliza Burke in fee simple, and in the event of the death of said Eliza Burke leaving the said James Burke surviving her, the whole of said property hereinbefore described, together with all property by them subsequently acquired, shall at once vest in the said James Burke in fee simple.

"In witness whereof the said James Burke and Eliza Burke have hereunto set their hands and seals this 30th day of December, A. D. 1886.

"Signed sealed and delivered in presence of: G. H. Hill, Henry Sprague.

"Eliza Burke, (Seal)
"James Burke, (Seal)"

This contract was duly acknowledged by the parties in the form and in the manner required for the acknowledgment of deeds. On the next day, viz., December 31, James Burke died, leaving surviving him his widow, Eliza Burke, and the plaintiffs, who were then minor children. On January 13, 1887, the above contract was filed for record, and recorded in King county. On January 31, 1888, Eliza Burke sold, and, by warranty deed, conveyed, the said property, and delivered possession thereof to one H. E. Kelsey. Thereafter, and by mesne conveyances, intervenor, Lucy R. Lyon, became the owner thereof, and is now in possession by the other named defendants, who are her tenants. This action was brought by the plaintiffs, who are the surviving heirs of James and Eliza Burke, to recover an undivided one-half interest in the property described. The case was tried by the lower court upon an agreed statement of facts, and a judgment was entered dismissing the action. Plaintiffs appeal.

Under the view we have taken, we deem it unnecessary to state any of the other agreed facts. The facts as above stated are sufficient for a determination of the case. It is argued by appellants that the contract above set out passed no present interest to either spouse in the property described, and therefore was no more than a will, and a number of authorities from other states are cited to that effect. It is then argued that, since the agreement was never probated, and since it did not conform to the statutory requirements for a will, and mentioned none of the heirs, therefore, when Eliza Burke sold the property, she conveyed away only her undivided one-half interest. Whether or not this argument would be sound under common law rules is not necessary for us now to decide because we have a statute which expressly provides for agreements of this kind. Section 4492, Bal. Code (Pierce's Code, § 3883) reads as follows:

"Nothing contained in any of the provisions of this chapter, or in any law of this state, shall prevent the husband and wife from jointly entering into any agreement concerning the status or disposition of the whole or any portion of the community property, then owned by them or afterwards to be acquired, to take effect upon the death of either. But such agreement may be made at any time by the husband and wife by the execution of an instrument in writing under their hands and seals, and to be witnessed, acknowledged, and certified in the same manner as deeds to real estate are required to be, under the laws of the state, and the same may at any time thereafter be altered or amended in the same manner: Provided, however, That such agreement shall not derogate from the right of creditors, nor be construed to curtail the powers of the superior court to set aside or cancel such agreement for fraud, or under some other recognized head of equity jurisdiction, at the suit of either party."

The agreement in this case was executed under this sec-

tion in the form and manner required, and was placed of record in the county where the lands were situated. No question is raised here as to the formality of the agreement, or the good faith thereof, and it is apparently conceded that, if this is a valid statute, the agreement vested the title of the property in dispute in Eliza Burke, upon the death of her husband.

But appellants argue that this section of the statute is invalid because, (1) it is not germane to the title of the act under which it was passed, and (2) it in effect repealed § 11 of the act of 1854, defining the jurisdiction and practice in the probate courts, which section is as follows:

“If any person make his last will and die, leaving a child or children, or descendants of such child or children, in case of their death, not named or provided for in such will, although born after the making of such will, or the death of the testator, every such testator, so far as he shall regard such child or children, or their descendants, not provided for, shall be deemed to die intestate, and such child or children, or their descendants, shall be entitled to such proportion of the estate of the testator, real and personal, as if he died intestate, and the same shall be assigned to them, and all the other heirs, devisees, and legatees shall refund their proportional part.” Bal. Code, § 4601.

The title of the act of 1879, under which the section of the code relating to agreements was first passed, is as follows: “An act relating to and defining the property rights of husband and wife.” We think this title was sufficient to support the provision for agreements between husband and wife and defining the effect thereof as to their community property. It has been frequently said by this court that the title of an act need not be an index thereof, but it is sufficient if it points out the general purpose and scope of the act. *Marston v. Humes*, 3 Wash. 267, 28 Pac. 520; *Hathaway v. McDonald*, 27 Wash. 659, 68 Pac.

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376; *Seattle v. Barto*, 31 Wash. 141, 71 Pac. 735; *State v. Sharpless*, 31 Wash. 191, 71 Pac. 737; *State ex rel. Zenner v. Graham*, ante, p. 81, 74 Pac. 1058.

The purpose of this act was to define the property rights of husband and wife. It is commonly known as the community property law. Under this title, one would naturally expect to find the definition of what is, and what is not, community and separate property of husband and wife, and all the different conditions under which such property may be acquired, held, or disposed of; and it is provided by the act that property acquired in a certain way shall be common property of both spouses, and property acquired in a certain other way shall be separate property of each spouse. And the section in question then provides for the status of the common property, by the agreement of the parties, to take effect after the death of either, the effect of which section is to give the parties power to make community property, during life, the separate property of the survivor, after the death of either. This is clearly within the scope and general purpose of the title of the act.

There is no merit in the argument that this section repeals § 11 of the act of 1854, which is now § 4601, Bal. Code. That section refers to the construction of wills. This contract is not a will, and is not governed by the laws relating to wills. It is a special contract provided for by statute. But even if it were held to be a will, the objection made is not tenable because, if it is a will at all, it must be such under the special provisions of this act. The rule is well settled that general provisions of a statute must yield to subsequent special ones. *Corbett v. Territory*, 1 Wash. Ter. 431; *Littell & Smythe Mfg. Co. v. Miller*,

3 Wash. 480, 28 Pac. 1035; *Meade v. French*, 4 Wash. 11, 29 Pac. 833.

The judgment of the lower court was right and is affirmed.

FULLERTON, C. J., and HADLEY, ANDERS, and DUNBAR, JJ., concur.

[No. 4804. Decided January 11, 1904.]

NORRIS SAFE & LOCK COMPANY, *Appellant*, v. F. LEWIS
CLARK *et al.*, *Respondents*.¹

APPEAL AND ERROR—DECISION—MODIFICATION UPON REHEARING—CONSTRUCTION—PLEADING—NECESSITY OF AMENDMENT—DISMISSAL OF ACTION. Where plaintiff alleged error in refusing leave to amend its complaint to show an assignment to it of the contract sued on, and in its opinion the supreme court in reversing the case at first states that the complaint is sufficient without alleging the assignment, but upon a rehearing the opinion is modified and the conclusion reached that the lower court erred in refusing to allow the amendment, and it is ordered that such leave be granted, the effect of the decision is to make the amendment essential; and upon return of the case it is proper to dismiss the action upon the plaintiff's declining to amend (Fullerton, C. J., dissenting).

SAME—TRIAL—WAIVER OF AMENDMENT—ASSIGNMENT FOR TRIAL—DISMISSAL AND NONSUIT. In such a case the defendant's submitting to an assignment for trial when no amendment had been made is not a waiver of the right to a dismissal upon plaintiff's refusing to amend, such dismissal being equivalent to a nonsuit.

Appeal from a judgment of the superior court for Spokane county, Belt, J., entered October 29, 1902, dismissing the action upon the plaintiff's declining to amend its complaint in accordance with an opinion of the supreme court upon a former appeal. Affirmed.

¹Reported in 74 Pac. 1019.

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Opinion Per HADLEY, J.

R. E. Porterfield and James Dawson, for appellant.

W. J. Thayer, for respondents.

HADLEY, J.—This is the second appeal in this case. The former decision is reported in 28 Wash. 268, 68 Pac. 718, 70 Pac. 129. It will be observed by reference to that opinion that the issues involved the foreclosure of an alleged lien for material used in the construction of a building. A written contract to furnish the material was originally entered into between the Macneal & Urban Company and respondent F. Lewis Clark. The Macneal & Urban Company manufactured the material specified in the contract, and shipped it to the Norris Safe & Lock Company, the appellant in both this, and the former, appeal.

Appellant claims, that the Macneal & Urban Company did not furnish the material to respondent Clark; that the same was, by said company, shipped to appellant; and that the latter furnished it to said respondent. The written contract with the Macneal & Urban Company specified a definite price for the material described in it, but appellant seeks recovery for a greater sum. The amount demanded is materially greater than the amount specified in the Macneal & Urban Company contract, but it is claimed that some molding furnished was not included in the written contract, and that the extra item accounts for the difference.

Respondents dispute the right to recover any greater sum than the amount named in the original Macneal & Urban Company contract, and also contend that the goods were furnished by that company, under and in pursuance of that contract; that appellant did not furnish the material, and is not entitled to recover, or to enforce a lien, even if any sum is unpaid.

At the first trial a nonsuit was granted, and the appeal was from the judgment of nonsuit. At that trial the plaintiff asked the court for leave to amend the complaint, so as to show that it was the assignee of the Macneal & Urban Company contract. The request was denied by the court. Upon the former appeal this court decided to reverse the judgment, and, in the original opinion filed, held that, under the showing in the record, the respondents had dealt with appellant as the owner of the material, and that they therefore could not claim that appellant did not furnish it. It was further remarked:

"Under the evidence in this case touching the conduct of the respondents in dealing with the appellant in obtaining a delivery of the goods and in paying for them in part, there was no necessity for showing an assignment to the appellant of the Macneal & Urban contract, and all evidence as to this was immaterial, or at least merely explanatory."

It will thus be seen that, at the time the original opinion was prepared and filed, the court took the view that, by reason of the course of dealing between appellant and respondents, it was unnecessary to allege and prove an assignment of the Macneal & Urban Company contract, in order to entitle appellant to recover. Upon petition for rehearing, however, a short opinion was filed which follows the original one at page 277, 28 Wash. [70 Pac. 129]. In that opinion it is stated that the court had concluded to modify the original opinion. It was stated that we had concluded that the court erred in refusing to allow the amendment alleging an assignment of the Macneal & Urban Company contract, and it was ordered that such leave should be granted to appellant. Upon the return of the cause to the superior court, appellant declined to amend, and the cause was dismissed for default in making the amendment.

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Opinion Per HADLEY, J.

It is urged by appellant that it understood the order granting leave to amend was merely permissible, and not mandatory, and that it was optional with it whether it should amend or not. It is true the order was not mandatory in the sense of being an unqualified command to do a thing, but it was mandatory in the sense of saying to appellant that the amendment was material and necessary, and that if it failed to make it, the necessary consequence would follow. It is argued, that appellant could not fairly gather from the opinion on rehearing that this court intended to say the amendment was material, inasmuch as it had said in the main opinion that it was not material; that no assignment need be shown; and that all evidence upon that subject was immaterial.

It is true the language of the opinion upon rehearing is condensed, and is perhaps not as clear and comprehensive as more words might have made it; but it is first clearly and definitely stated that the court had concluded to modify the original opinion. It is manifest, from what follows, that the modification intended was not of an immaterial or unimportant nature, since it was expressly stated that the trial court erred in refusing the amendment, which act was held to be not error in the main opinion. Thus what was first held to be unimportant and immaterial was later, in effect, declared to be all-important and material to appellant's right to recover in the action. Any other view would render the language of this court futile and meaningless, upon the petition for rehearing. It would be an empty thing for an appellate court to say that a trial court erred in refusing a certain thing, and then proceed to order the doing of that thing, if it should not be of any consequential materiality when done. We think appellant should have seen, from what was said on the petition for rehearing, that the court had changed its

views upon an important feature of the case, and that averments as to the assignment of the Macneal & Urban Company contract, and evidence in support thereof, were necessary before appellant could prevail in the action.

Appellant urges, that after the return of the cause to the superior court it was assigned for trial; that the assignment was vacated at the request of respondents' counsel for his own convenience; that soon afterwards respondents moved for default because of appellant's failure to amend its complaint. It is argued that, by submitting to an assignment of the cause for trial when no amendment had been made, respondents waived the point, and could not afterwards be heard to raise it. It will be remembered, however, that this court had held that the complaint must be amended before recovery could be had. Appellant's refusal to amend was an election to stand upon the original complaint. Since the complaint, unamended, was insufficient to warrant any recovery, the trial court had the alternative of entering judgment for dismissal, upon appellant's refusal to plead further, or of proceeding to trial and granting a nonsuit. It certainly would not be urged that respondents had waived the point if the case had proceeded to a motion for nonsuit. They would undoubtedly have had the right to move for nonsuit, for failure of necessary proof or of allegations to sustain such proof. Appellant having already elected to stand upon its original complaint, it was then apparent to the court that the necessary proof to establish the right of recovery could not be received under the pleadings. The judgment for dismissal was, therefore, the equivalent of such a judgment in any case when a party whose pleading has been held insufficient has declined to plead further.

We think the court did not err, and the judgment is affirmed.

Jan. 1904] Dissenting Opinion Per FULLETON, C. J.

MOUNT, ANDERS, and DUNBAR, JJ., concur.

FULLETON, C. J. (dissenting).— I am constrained to dissent from the conclusion reached in this case. In the opinion reported in the 28th Washington, this court, after a long review of the evidence, drew conclusions therefrom as follows:

“The respondents, notwithstanding they first made a contract with the Macneal & Urban Company for the same material, dealt with the appellant as the owner of the material, and by so doing received possession thereof. They cannot now claim that the appellant did not furnish the material. The material was shipped to, purchased and paid for by, the appellant. Respondents knew this. After the delivery the respondents paid the appellant all that was paid for the material, so far as the record discloses, being the greater portion of the value thereof. Under the evidence in this case touching the conduct of the respondents in dealing with the appellant in obtaining a delivery of the goods and in paying for them in part, there was no necessity for showing an assignment to the appellant of the Macneal & Urban contract, and all evidence as to this was immaterial or at least merely explanatory. Appellant is suing to recover for the reasonable value of materials that it had purchased, paid for, and delivered to the respondents, and which were received by the respondents from it, knowing that it had purchased and paid for the same, and that it looked to them for repayment. Testimony was introduced as to the reasonable value of all the material furnished. We think the respondents should be allowed to controvert the value of the material furnished.”

The opinion passing on the petition for rehearing is as follows:

“On consideration of this case on petition for rehearing, we have concluded to modify the opinion filed herein, reported in 68 Pac. 718. It appears from the record that the Macneal & Urban Company assigned its contract to the Norris Safe & Lock Company. The appellant, during the

progress of the trial, offered to amend its pleadings so as to show such assignment. The court refused to allow such amendment. We think, under the circumstances of this case, the court erred in refusing to allow the amendment, and this cause is remanded for a new trial, with leave to the appellant to amend its pleadings so as to show an assignment of the contract made by the Macneal & Urban Company with F. Lewis Clark to the Norris Safe & Lock Company. And the respondents are permitted to show any defense or counterclaim to such amended complaint that they may have. The appellant to recover its costs on this appeal and the costs of the suit to abide its final determination."

It will be observed that the first quotation states, in language as plain as it is possible to employ, that the question whether there had, or had not, been an assignment of the contract from the Macneal & Urban Company to the Norris Safe & Lock Company was immaterial, because the respondents had dealt with the latter company as owners and were, therefore, estopped to assert the fact that they had purchased from another company. It will be observed, also, that the opinion on the petition for rehearing in nowise indicates any modification of these views. It is not stated that this court had erred in its first conclusion, or had in any manner changed its views concerning the necessity of an amendment to the complaint; on the contrary, it is said that the *trial court* had erred, and that the appellant was entitled to have that error corrected; the inference being that the court had not granted it all of the relief to which it was entitled.

In this connection it must be borne in mind that the court did not require the appellant to answer the petition for rehearing, and that, so far as the record shows, neither it, nor its counsel, ever saw that petition; and it cannot, therefore, be held to have read the opinion in the light of that petition. For these reasons it seems to me the appel-

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Opinion Per Curiam.

lant might well have concluded that this court did not intend to hold that an amendment to the complaint was necessary before it could be permitted to prove its cause of action; and that its claim to the effect that, if it has misconstrued the opinion of this court in that respect, it has been misled to its prejudice, is well founded. It is needless to add that this court, being a court of last resort, ought, if there is the least doubt on a question of this kind, to give the complainant the benefit of that doubt.

I think the judgment should be reversed.

[No. 4705. Decided January 13, 1904.]

HARRY SELLERS, *Respondent*, v. THE PACIFIC WRECKING
& SALVAGE COMPANY, *Appellant*.¹

APPEAL AND ERROR—AFFIDAVITS HOW BROUGHT UP. Affidavits used upon a motion to vacate a judgment must be brought up by a statement of facts or they can not be considered on appeal.

JUDGMENT—VACATION—PRESUMPTION AS TO REGULARITY. A judgment entered after a trial in the absence of defendant, who alleges he had no notice of the trial, will be presumed regular where the record fails to show that he had no notice, since error must be affirmatively shown.

Appeal from an order of the superior court for King county, Griffin, J., entered September 20, 1902, refusing to vacate a judgment. Affirmed.

C. L. Parker, for appellant.

William Martin and *W. A. Keene*, for respondent.

PER CURIAM.—In this action the respondent sued the appellant to recover upon a promissory note. An answer

¹Reported in 74 Pac. 1056.

was filed to the complaint, and to the answer a reply, raising an issue of fact. Upon this issue a trial was had by jury, in the absence of the appellant, resulting in a judgment for the respondent. Between the return of the verdict and the entry of judgment, the appellant appeared, and objected to the entry of a judgment on the verdict. On its motion being overruled and judgment entered, it moved to vacate the judgment, which motion being also overruled, it appealed to this court.

The appellant based its objection to the entry of judgment, and its motion to vacate, upon the ground that it had not received sufficient, or any, notice of the setting of the case for trial, and supported its motion by affidavits. These affidavits have not been brought to this court. True, copies of certain affidavits appeared in the transcript over the certificate of the clerk, but as we have repeatedly held, this is insufficient to bring them to the consideration of this court. *Chevalier & Co. v. Wilson*, 30 Wash. 227, 70 Pac. 487, and cases cited.

The record which we can properly consider fails to show any cause for reversal. While it shows that the case was put at issue, that a note of issue was filed and served, that the case was afterwards set down for trial, and thereafter tried, it fails to show that the appellant had no notice of any of these several proceedings. The superior court is a court of general jurisdiction. Every intendment is in favor of the regularity of its record; and, unless that record shows affirmatively that error was committed, error cannot be predicated thereon. In other words, error is never presumed; it must be shown affirmatively by the record. Tested by these rules, the record before us requires an affirmance of the judgment appealed from, and it is so ordered.

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Opinion Per DUNBAR, J.

[No. 4733. Decided January 15, 1904.]

PETER LARSON *et al.*, Respondents, v. J. H. ALLEN, Appellant.¹

SALES—CONSTRUCTION OF BILL OF SALE—DESCRIPTION OF TIMBER SOLD. The grant in a bill of sale of "all the timber of whatsoever kind and description now standing upon the following described lands," should not be construed as a reservation of fallen timber, but passes title to all timber being upon the lands.

SAME—ACTION TO QUIET TITLE TO TIMBER SOLD—VENDOR WHEN PROPER PARTY. Where a party sells all the timber upon a tract of land, and subsequently makes another bill of sale of all the cedar timber on the same land, he is a proper party defendant to an action by his first grantees, brought to quiet title to the timber, in which it is alleged that he claims an interest therein, since his second bill of sale was an interference with plaintiff's rights.

Appeal from a judgment of the superior court for Snohomish county, Denney, J., entered December 6, 1902, after a trial before the court without a jury, quieting the plaintiffs' title to timber sold, and enjoining its removal. Affirmed.

Brownell & Coleman, for appellant.

L. N. Jones and *Dorr & Hadley*, for respondents.

DUNBAR, J.—This action was brought by respondents to quiet their title to all the timber described in the complaint, to enjoin the appellant and the defendants from entering upon said land and from cutting or removing any timber therefrom, and for damages for timber already cut and removed. Judgment was obtained quieting the title and restraining the defendants from entering upon said lands for the purpose of cutting and removing any of the timber therefrom, or in any wise interfering with the

¹Reported in 74 Pac. 1069.

possession of the plaintiffs in the exercise of their rights on said premises. The original defendants to the action were Malacha Ryan, D. E. Service, and J. H. Allen. Defendant Service was dismissed from the case, Ryan defaulted, and Allen answered with substantially a general denial.

The real merits of the case depend upon the construction of the contract of sale given by Allen to one Moore, from whom, through divers and sundry mesne conveyances, the plaintiffs claim title and right to said timber; the contention of the appellant being that it was only the standing timber that was conveyed by Allen to Moore, while the respondents contend that the just construction of the instrument is that all the timber was conveyed. The pertinent portion of the bill of sale from Allen to Moore is as follows: "Do by these presents grant, bargain, sell and convey unto the said party of the second part, his executors, administrators and assigns, all the timber of whatsoever kind and description now standing upon the following described lands, towit, . . ." This bill of sale was executed on the 12th day of May, 1897, granting to Moore all the time he might desire in which to remove the said timber from said land, and free use of all such lands for the purpose of cutting, hauling and removing the timber therefrom, or from any other land contiguous thereto.

On the 31st day of December, 1901, J. H. Allen sold to defendant Ryan certain timber on the same described tract of land. The bill of sale reads as follows: "It is agreed by and between J. H. Allen, party of the first part, and M. Ryan, party of the second part, that the party of the first part sells to the party of the second part all the cedar timber on the Chartrand place on the north fork of the Stillaguamish river," which is the land described by the other bill of sale. It will be observed that this

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latter bill of sale, in any event, is a sale of timber that passed to Moore from Allen in the first bill of sale above noticed, because there was no reservation of cedar timber, or any other particular kind of timber, in that bill of sale; and we are convinced, from an examination of the bills of sale and the whole record, that it was the intention to sell Moore all of the timber upon the tract described; and that the words "now standing upon the following described lands," were not used for the purpose of reserving from the operation of the bill of sale fallen timber, but were used in the sense of the timber now being upon the following described lands; and that, therefore, the title to all the timber on the land passed to Moore and, through him, to the respondents.

It is contended by the appellant Allen that he should have been dismissed from this case, for the reason that he had no interest in it. He was brought into the case by the complaint alleging that he claimed some interest in the timber. We think that he was a proper party to the action, that he had already attempted, by his bill of sale to Ryan, to interfere with the rights of the respondents, and that the respondents had a right to have their title made clear against Allen, as well as against Allen's grantee.

There was no mistake made by the court in the scope of its judgment, and in all respects it should be affirmed. It is so ordered.

FULLERTON, C. J., and ANDERS and MOUNT, JJ., concur.

34	116
33	105
36	667
34	116
38	211

[No. 4752. Decided January 16, 1904.]

CITY OF BALLARD, *Respondent*, v. GEORGE WAY *et al.*
*Appellants.*¹

JUDGMENT—PROCESS—RECITAL OF DUE SERVICE—PRESUMPTION IN FAVOR OF. A judgment of the superior court reciting generally due service of process, raises the presumption of a valid service, although the only proof in the record shows a defective publication as to the nonresidents; and a resident defendant to avoid the judgment must show affirmatively that no personal service was made.

TAXATION—TAX DEED—GENERAL TAXES PARAMOUNT TO LOCAL ASSESSMENTS. A purchaser at a sale for general taxes acquires a valid title as against liens for streets assessments, since the tax lien is paramount and superior to all other liens.

Appeal from a judgment of the superior court for King county, Tallman, J., entered March 10, 1903, upon the findings and decision of the court in favor of the plaintiff after a trial on the merits, foreclosing the city's lien for improvement assessments. Reversed.

M. E. Sheldon and *John B. Van Dyke*, for appellants.

H. E. Peck, for respondent, to the point that presumptions will not be indulged in aid of recitals where the record states the evidence showing want of jurisdiction, but the recital yields to the record, cited: *Galpin v. Page*, 18 Wall. 350; *Godfrey v. Valentine*, 39 Minn. 336, 40 N. W. 163, 12 Am. St. 657; *Barber v. Morris*, 37 Minn. 194, 33 N. W. 559, 5 Am. St. 836; *Clark v. Thompson*, 47 Ill. 25, 95 Am. Dec. 457; *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742; *Adams v. Cowles*, 95 Mo. 501, 8 S. W. 711, 6 Am. St. 74; *Fowler v. Simpson*, 79 Tex. 611, 15 S. W. 682, 23 Am. St. 370; 17 Am. & Eng. Enc. Law, 1077, 1081; 12 Enc. Plead. & Prac. 174, 175; *Freeman, Judgments* (4th ed.) §§ 125, 130; *Senichka v. Lowe*,

¹Reported in 74 Pac. 1067.

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Opinion Per MOUNT, J.

74 Ill. 275; *Fortman v. Ruggles*, 58 Ill. 207; *Clark v. Thompson*, 47 Ill. 25, 95 Am. Dec. 457; *Hyde v. Redding*, 74 Cal. 495, 16 Pac. 380; *Latta v. Tutton*, 122 Cal. 279, 54 Pac. 844, 68 Am. St. 30.

MOUNT, J.—This action was commenced by the city of Ballard in King county, to foreclose two liens against lot 12, block 15, of Gilman Park in said city, for street improvements made in the year 1891, the lot being a corner lot facing upon two streets. On a trial, judgment was entered in favor of the city. Defendants appeal.

The facts in the case are undisputed, and are substantially as follows: In the year 1891 the city of Ballard passed ordinances providing for the improvement of the two streets facing on the property above described, and also providing for assessments of the property to pay therefor. The streets were thereupon improved, but the assessments were declared void by the courts. Subsequently, in 1897, by virtue of an act of the legislature of March 9, 1893, the city passed ordinances providing for reassessments of this lot, to pay the costs of the improvement, together with the penalty and interest thereon. The liens created by these reassessments are the ones now sought to be foreclosed.

At the time the improvements and assessments were made the property was owned by the Woman's Home Association, a domestic corporation, of Seattle. After the street improvements were made, general taxes for state, county, and municipal purposes were levied against the lot for the years 1892 to 1896, inclusive. These taxes were permitted by the owner to become delinquent. On October 2, 1900, Alexander McDonald purchased from the treasurer of King county a certificate of delinquency for the general taxes then delinquent against the property in question, and, at the same time, paid taxes due for the years 1897-8-9. Mr. McDonald afterwards brought an

action in the superior court of King county against the "Woman's Home Association and all persons unknown, if any, having or claiming an interest or estate in and to the hereinafter described real property," to foreclose his lien for taxes against the lot in question. Thereafter, on the 16th day of April, 1901, the said court entered a judgment which recites as follows:

"This cause coming on for trial this day, and it appearing to the satisfaction of the court that the notice and summons in said cause was regularly and duly served on the above named defendants, as the law in such cases requires, and more than sixty days have elapsed since said service, and defendants have failed, neglected, and refused to appear and contest or make any appearance at all in said action, it is therefore ordered. . . ."

The judgment then proceeds to find that the plaintiff therein has a tax lien against the property, and ordered a sale thereof to satisfy the same. The property was accordingly sold and bid in by Mr. McDonald for the amount of his claim, and thereafter, on April 27, 1901, a deed was issued to him therefor. On May 31, 1901, Mr. McDonald sold and conveyed the property to the appellant George Way. Subsequently Mr. Way also obtained a deed from the Woman's Home Association for the property.

In the record of the case of McDonald v. Woman's Home Association, there is no return of personal service, but there is an attempted publication of summons, which appears to be defective for several reasons. This service, however, is not relied upon as giving the court jurisdiction in that case. Counsel for appellants relies exclusively upon the finding of service in the judgment above quoted. At the trial the validity of this judgment was attacked upon the ground that the summons had not been served, and respondent was permitted to call Mrs. Ingraham as a witness. This witness testified, that she was secretary

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of the Woman's Home Association from the year 1890 to 1895, and that no one was ever elected to succeed her; that Mrs. Henry Furman was president of the corporation during the years 1899, 1900, and 1901; that the corporation was a local one, and that all the members and officers were at all times residents of King county. She was not asked and did not state that no personal service of the complaint in McDonald v. Woman's Home Association was had upon the association.

It is not questioned here that the reassessment made by the city in 1897 is regular, and that the improvements were made; nor is it questioned that the sale, and all proceedings had under the judgment in McDonald v. Woman's Home Association, are regular and valid, provided the court had jurisdiction to render the judgment. It will therefore be readily observed that there are but two principal questions in the case: (1) Did the court have jurisdiction to enter the judgment in the case of McDonald v. The Woman's Home Association? (2) If so, is the lien for general state, county, and municipal taxes paramount to the lien for street improvements?

(1) It is apparently conceded that the record shows no legal service by publication, and appellants do not contend that the record outside of the judgment shows personal service by the return of any officer or person authorized to make it. But they contend that since the court is one of general jurisdiction the finding in the decree "that the notice and summons in said cause was regularly and duly served on the above named defendants, as the law in such cases requires," is conclusive, and they rely wholly upon this finding. In the case of *Munch v. McLaren*, 9 Wash. 676, 38 Pac. 205, this court said:

"By the filing of the complaint the court obtains jurisdiction of the subject matter, and by the service of the

summons, of the person of the defendant; and every fact not negatived by the record will be presumed in aid of the judgment, and it will only be held void when it affirmatively appears from the record that the court had no jurisdiction to render it."

This case was followed in *Rogers v. Miller*, 13 Wash. 82, 42 Pac. 525, 52 Am. St. 20, where it was held that the question of service of the summons was a question of fact for the court trying the case to determine, and it was there said:

"The finding of the court 'that service of the complaint and notice had been duly made according to the law,' is not contradicted by merely showing that a summons which was legally insufficient had in fact been published."

To the same effect are the following cases from this court: *Belles v. Miller*, 10 Wash. 259, 38 Pac. 1050; *State ex rel. State Ins. Co. v. Superior Court*, 14 Wash. 203, 44 Pac. 131; *Christofferson v. Pfennig*, 16 Wash. 491, 48 Pac. 264; *Kizer v. Caulfield*, 17 Wash. 417, 49 Pac. 1064; *State ex rel. Boyle v. Superior Court*, 19 Wash. 128, 52 Pac. 1013, 67 Am. St. 724; *Kalb v. German Savings & Loan Society*, 25 Wash. 353, 65 Pac. 559, 87 Am. St. 757; *Peyton v. Peyton*, 28 Wash. 278, 298, 68 Pac. 757; *Noerdlinger v. Huff*, 31 Wash. 360, 72 Pac. 73. It is true, as argued by respondent, that some very eminent authorities have said that the

"findings of jurisdiction may affirm, in general terms, the service, or due service, of process, without indicating that the attention of the court has been specially called to the kind of service made, or that it has probably based its finding upon other evidence than that disclosed by the record. In such cases it is not reasonable that the general statement should prevail over the evidence contained in the record. It should rather be construed as referring to and founded upon it; and if the service shown by it is not such as will support the judgment, it should be treated as

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void, notwithstanding the general statement in the judgment that process has been duly served." 1 Freeman on Judgments (4th ed.), § 130, and authorities cited.

But this court early adopted the rule that the recital of due service in the judgment, by domestic superior courts, raises the presumption of a valid service, and that every presumption must be indulged in favor thereof. Accordingly it was held in *Rogers v. Miller, supra*, that, where there was ample time for another summons to have been issued and served, this court would, on collateral attack, presume such fact in aid of the judgment; and in *Christofferson v. Pfennig, supra*, where an insufficient affidavit of publication appeared in the record, it was held that we would presume, in aid of such judgment, that other sufficient affidavits were filed; and in *State ex rel. Boyle v. Superior Court, supra*, where the return of personal service was not verified as required, it was said:

"The presumption must be that there was a valid service. This document might in fact have been sworn to in open court before the judge at the time the judgment was taken."

We are satisfied with this rule, and are not disposed to change or modify it now.

Conceding, without intending to decide, that the respondent in this case was at liberty to attack the validity of the judgment in *McDonald v. Woman's Home Association*, no evidence was offered that the defendants in that case were not legally served with process. The only evidence offered or introduced was to the effect that the corporation was a domestic corporation, and all the officers thereof were, at the time the action was begun, residents of King county. The defendant Woman's Home Association was therefore required to be served personally. The judgment shows upon its face that the defendants had

been served as required by law. In order to avoid the judgment, it devolved upon the respondent to show that no legal service was made, and that the court had no jurisdiction. This was not done. It follows, under the rule above stated, that the court is presumed to have had jurisdiction, and that the judgment is valid.

(2) The question as to the priority of liens for general taxes over street assessments has recently been so fully and carefully considered by this court as to need no further discussion. In *McMillan v. Tacoma*, 26 Wash. 358, 67 Pac. 68, we said:

"It must be held that the holder of a delinquent general tax certificate is not required to pay local street assessment liens before he can proceed to foreclose and sell under his general tax lien. He is entitled to a decree establishing his tax lien as paramount and superior to all other liens or charges against the property."

See, also, *Keene v. Seattle*, 31 Wash. 202, 71 Pac. 769; *State ex rel. Craver v. McConnaughey*, 31 Wash. 207, 71 Pac. 770. This being the settled rule, it follows that, when McDonald foreclosed his paramount lien and sold the property and became the purchaser, he acquired a valid title to the land, against which the respondent can not now foreclose an inferior lien. If the respondent has any right at all at this time, as against the appellants, such right is limited to a redemption. 1 Black, Judgments (2d ed.), § 448, and cases cited.

The judgment of the lower court must therefore be reversed, and the action dismissed.

FULLERTON, C. J., HADLEY, DUNBAR, and ANDERS, JJ., concur.

[No. 4981. Decided January 20, 1904.]

THE STATE OF WASHINGTON, *on Relation of the Washington Match Company et al., Plaintiff*, v. THE SUPERIOR COURT FOR PIERCE COUNTY, *Defendant*.¹

APPEAL—BOND—APPLICATION TO FIX AMOUNT OF SUPERSEDEAS. The fact that an appeal from an order appointing a receiver had not been perfected is not ground for the trial judge to refuse to fix the amount of the supersedeas bond on appeal, when the time for taking an appeal had not yet expired, since Bal. Code § 6506 contemplates that an appeal may be perfected by the giving of one bond as an appeal and supersedeas bond in the sum fixed by the court.

APPEAL AND ERROR—RECEIVERS—APPOINTMENT—STAY OF RECEIVERSHIP UPON APPEAL. Where a temporary receiver is appointed ex parte until a hearing can be had, and continuances are taken, until finally an order is entered in form making the temporary appointment permanent, such order is appealable as a temporary appointment regardless of its form, entitling appellant to give a bond staying the receivership; since the ex parte appointment had no force after the day of hearing, and a continuance or failure to appoint at that time had the effect to discharge the receiver, making the subsequent order a temporary appointment that could be appealed from and stayed.

Application to the supreme court filed December 22, 1903, for a writ of mandamus to compel the superior court of Pierce county, Huston, J., to fix the amount of a supersedeas bond on appeal from an order entered December 18, 1903, appointing a temporary receiver. Writ granted.

Reavis & Foster, for relators.

J. W. A. Nichols, for defendant.

PER CURIAM.—On November 25th, 1903, W. H. Kirwin and two others began an action against the relator, a corporation, to recover some \$3,500 paid in on its capital

¹Reported in 74 Pac. 1070.

stock, which they allege to have been obtained from them by the fraud of the promoters of the corporation. At the time of filing their complaint, and without notice to the relator, they procured the appointment of a temporary receiver to take charge of the affairs of the corporation pending a hearing on an application to appoint a permanent receiver. On the day fixed for the hearing, the relator appeared, and took issue with the applicants on the question of the necessity for a receiver. A hearing was thereupon had, which was continued from time to time until the 18th day of December, 1903, when the court announced that it would make the appointment of the temporary receiver permanent. Thereupon the relator gave notice that it desired to appeal from the order making the receiver permanent, and requested the court to fix the amount of the bond the court would require to supersede the receiver pending the appeal. The court declined to fix the amount, and made an order to that effect in the following language:

"This day to wit, December 18th, 1903, this cause came on for hearing on the application of the defendants, the Washington Match Company, W. J. Winters, C. F. Reeves, W. A. Dougherty, F. S. Shaw and W. E. Anderson, for an order fixing the amount of a supersedeas bond to be filed by said defendants, superseding the order and judgment heretofore made in this cause continuing the appointment of Frank B. Cole as Receiver, heretofore appointed in this cause on November 25th, 1903, without notice or intimation to these defendants, or any one of them.

"The Court, on consideration thereof, finds said order appointing and continuing the said Cole as Receiver in this cause is interlocutory and not appealable, and the court refuses said application and denies the same, and refuses to fix any amount of a supersedeas bond pending the appeal of said cause in the supreme court of the said state of Washington, and refuses to fix any supersedeas bond. To all of which the said defendants except."

The relator thereupon applied to this court for an alternative writ of mandate requiring the court to fix the amount or show cause why it should not do so. For return to the writ, the court makes two contentions: First, that the relator had not appealed from the order making the appointment of the receiver permanent at the time he applied for the order of supersedeas; and, second, that his subsequent appeal was from an interlocutory order, not an "order appointing or removing, or refusing to appoint or remove, a receiver."

Neither of these contentions is well taken. The statute (§ 6506, Bal. Code) contemplates that the appeal bond proper and the bond for stay of proceedings or supersedeas may be included in one instrument, and, as an appeal cannot be perfected without the filing of a bond within a limited time after notice is given, it would seem to follow that the appellant was entitled to have this amount fixed on application, whether he had or had not given notice of appeal. If it were shown, on return to the application, that no appeal had been taken and that the time therefor had expired, doubtless this would be a defense to the application, but when it appears, as it does in this case, that the right of appeal still exists, we think it no defense to show that appeal was not taken prior to the time the application to fix the amount of the supersedeas bond was made.

The second objection is based upon the form of the orders made, rather than upon their effect. The trial court seemed to be of the opinion that its temporary appointment of a receiver continued indefinitely, if no motion to discharge the same was made. This is not the rule. While the court may, on an *ex parte* application where an emergency is shown, appoint a receiver to take temporary charge of property until notice can be given and a hearing had on the question of the necessity for a receiver, such *ex parte*

appointment has no force beyond such hearing, and a failure to make an order after such a hearing appointing a receiver, or continuing the first appointment, would operate to discharge the temporary receiver. So whatever form the order of the 18th of December may have taken, it was in effect an order appointing a receiver and as such could be appealed from and superseded.

The writ will issue commanding the trial court to fix the amount of the supersedeas bond.

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41 82

[No. 4880. Decided January 20, 1904.]

BO SWEENEY, *Respondent*, v. ÆTNA INDEMNITY COMPANY, *Appellant*.¹

PRINCIPAL AND AGENT—INDEMNITY—AUTHORITY OF ARCHITECT TO MODIFY BUILDING CONTRACT. An architect designated in a building contract as agent for the owner "for the purposes of the contract" has no power to modify any of the terms of the contract unless expressly authorized, and the fact that the owner left it to the architect to secure a contractor's bond, does not authorize him to modify the terms of the contract so that payments were to be made through the surety company, when the contract showing the extent of his authority was exhibited to the surety company.

SAME—BOND ISSUED ON UNAUTHORIZED MODIFICATION OF CONTRACT—CONSIDERATION. Where a surety company requires a building contract to be modified and accepts such change by the architect who, from the contract, appeared to have no authority to make the alteration on behalf of the owner, and the company fails to notify the owner of the modification, it cannot claim that the bond was void as issued without consideration, after the owner paid out money on the contract on the faith of the bond.

INDEMNITY—CONSIDERATION—BOND NOT REQUIRED BY THE CONTRACT. A contractor's bond guaranteeing the completion of a building contract, is not void as issued without consideration because the contract failed to require any bond or security, when

¹Reported in 74 Pac. 1057.

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the owner refused to execute the contract unless such bond was furnished.

Appeal from a judgment of the superior court for King county, Griffin, J., entered June 27, 1903, upon the verdict of a jury rendered in favor of the plaintiff in an action upon a contractor's bond. Affirmed.

Root, Palmer & Brown, for appellant.

Alfred Battle and Sweeney, French & Steiner, for respondent.

MOUNT, J.—On March 15, 1902, respondent and one G. H. Barwick entered into a contract whereby said Barwick agreed, in consideration of \$1,915, to furnish materials and erect five one-story cottages for respondent in Seattle. There was no provision in the contract requiring Barwick to give respondent security for the faithful performance of the contract, but, before the contract was signed, respondent demanded such security, and Barwick agreed to give it.

After the contract was signed, it was left with respondent, who instructed the architect, P. J. Donohue, named in the contract as agent of the respondent for the purposes of the construction of the buildings, to see that Mr. Barwick gave the required bond before he entered upon the work. A few days later Mr. Donohue called upon respondent for the contract for the purpose of making a copy thereof to be left with the bonding company, who were to furnish the indemnity bond. Mr. Donohue, in company with Mr. Barwick, thereupon took the original contract, and went to the office of the agents of appellant to secure the said bond. The agents of appellant, upon examining the contract between respondent and Barwick, required the contract to be changed so that all payments to the contractor should be made through them. Mr. Dono-

hue, without authority from the respondent, and without his knowledge, consented that the change should be made; whereupon, the following words were inserted therein by the agents of appellant: "All payments to be made to Burns & Atkinson, agents, who will disburse same in payment of labor and material bills, and hand surplus, if any, to the contractor." Thereupon the contract of indemnity was issued and delivered to respondent.

The original contract, as altered, was retained by the agents of appellant. Respondent did not know of this alteration in the contract, and was not informed thereof until after default by the contractor. He paid the contractor as the work progressed, according to the terms of the original contract before it was altered. Before the cottages were completed, the contractor defaulted and left the country, and respondent notified the appellant thereof. After the contractor made default, respondent finished the buildings at a cost of more than the face of the bond in addition to the contract price. Respondent thereafter brought this action to recover upon the bond. The cause was tried to a jury, and a verdict rendered for the full amount of the bond, viz., \$500.

It is claimed by appellant that Donohue was agent of the respondent for the purpose of getting the bond, and whatever the agent did about changing the contract was binding upon respondent. The record shows that Donohue, as architect, was agent of respondent "for the purposes of the contract." There is nothing in the contract authorizing Mr. Donohue to modify the terms of the contract, or enter into a new one.

"The mere fact that a person is employed as an architect does not constitute such person a general agent of his employer, his powers as agent being limited by the contract entered into between them. Thus, unless specially authorized, he is not entitled to change, alter or modify the con-

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tract entered into by the builder and his employer." 6 Cyc., 29, and authorities cited.

The contract itself, which was exhibited to the surety company, very plainly showed that the extent of Mr. Donohue's authority as agent was limited to the construction of the buildings, and in no way authorized him to make a new or different contract from the one already entered into between the parties thereto. Nor would the fact that Mr. Donohue was directed to go with the contractor, and see to it that he got the bond which he had promised to obtain, authorize Mr. Donohue to change the contract. When the agents of appellant saw the contract, and the extent of Mr. Donohue's authority as therein set out, and that it was executed by the principals, they were thereby put upon notice as to the authority of Mr. Donohue. It was therefore their duty to notify the principal in the contract, for whose benefit the security was given, of any change they desired made, before executing the bond as indemnity therefor. This was never done.

Appellant also contends that, if Mr. Donahue had no authority to change or authorize the change in the contract, since it refused to issue the bond on the contract as prepared and signed by the principals, but issued it only upon the contract as changed, therefore the bond was void. This position cannot be maintained, because, under the facts stated, the bond was to be furnished by the contractor to the respondent as a consideration for the contract. When the bond was issued and delivered to respondent without notice of any change in the original contract, he had a right to rely upon it as being in accordance with his contract, until he was notified differently. He had no notice that there had been any change in the terms of his contract. He relied upon it, and paid out his money upon the strength

of it. He had no reason to suspect that the bond was not what it purported to be.

Appellant further contends that the written contract between Barwick and respondent did not require Barwick to furnish any bond or security, and therefore the bond subsequently furnished was a mere gratuity without consideration and not enforceable. Several authorities are cited to that effect. But even if this is the correct rule, it has no application to this case because the evidence shows conclusively that, prior to the execution of the contract, respondent demanded of Barwick a bond for the faithful performance of the contract, and refused to enter into it with Barwick unless such bond were furnished. Barwick thereupon agreed to furnish such bond and, in consideration thereof, respondent signed the contract. This was a sufficient consideration as between respondent and Barwick to support the bond. Brandt on Suretyship & Guaranty (2d ed.), §§ 13, 15; *Pacific National Bank v. Ætna Indemnity Co.*, 33 Wash. 428, 74 Pac. 590. It is not contended that no consideration passed from Barwick to appellant for the bond.

The other points argued are covered by what is said above. There is no error in the record, and the judgment is therefore affirmed.

FULLERTON, C. J., HADLEY, DUNBAR, and ANDERS, JJ., concur.

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[No. 4851. Decided January 27, 1904.]

J. R. BELL, *an Infant, by his Guardian Ad Litem, J. D. Bell, Respondent*, v. BURT BUTLER, *Appellant*.¹

TRIAL—VERDICT—ARRIVED AT BY AVERAGE—MISCONDUCT OF. JURY—NEW TRIAL. A verdict determining the amount of damages for personal injuries is not invalid nor ground for a new trial, because it was the result of a computation whereby the quotient of the total of the sums each juror considered proper was adopted, if upon final consideration it receives the sanction of the number of jurors required.

Appeal from a judgment of the superior court for Spokane county, Richardson, J., entered April 11, 1903, upon the verdict of a jury rendered in favor of the plaintiff in an action for personal injuries. **Affirmed.**

John C. Kleber and *Albert G. Starkey*, for appellant. A quotient verdict will not support a judgment. *Ruble v. McDonald*, 7 Iowa 90; *Johnson v. Husband*, 22 Kan. 277; *Goodman v. Cody*, 1 Wash. Ter. 329, 34 Am. Rep. 811; *Gordon v. Trevarthan*, 13 Mont. 387, 34 Pac. 185, 40 Am. St. 452; *Warner v. Robinson*, 1 Root (Conn.) 195, 1 Am. Dec. 38; *City of Pekin v. Winkel*, 77 Ill. 56.

Harris Baldwin, for respondent.

PER CURIAM.—The respondent, an infant, brought this action to recover damages for personal injuries alleged to have been received by reason of the bite of a dog belonging to appellant. A verdict was returned in his favor. Thereafter a motion for a new trial was made and overruled, and a judgment entered, from which this appeal is taken. The motion for a new trial was based on the ground of misconduct of the jury in that they arrived at their verdict by lot or chance.

¹Reported in 75 Pac. 130.

From the record it appears that the jury unanimously agreed that the verdict should be for the plaintiff, but were at variance as to the amount. After considerable discussion, it was suggested that an average be struck of the various amounts contended for by the different jurors. This was done by setting down the amount each juror considered proper, and dividing the sum of these amounts by twelve, which gave a quotient of \$252.17. After further consideration, this amount was returned as the verdict. This court has heretofore held that such a proceeding, in itself, was not misconduct. In *Stanley v. Stanley*, 32 Wash. 489, 73 Pac. 596, under a similar state of facts, we said that, ". . . it is not a valid objection to a verdict that it was the result of this or some other method of computation, if it finally receives the sanction of the necessary number of jurors required to return a verdict." See also, *Watson v. Reed*, 15 Wash. 440, 46 Pac. 647, 55 Am. St. 899. We think the case before us falls squarely within the rule announced in these cases.

The judgment is therefore affirmed.

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[No. 4644. Decided February 4, 1904.]

WILLIAM D. LEGG *et al.*, Appellants, v. MALENA LEGG *et al.*, Respondents.¹

COSTS—ATTORNEY'S FEES—ACTION FOR PARTITION. In an action for a partition of real estate, attorney's fees outside the statutory fee can not be allowed or taxed as part of the costs or disbursements provided for by Bal. Code, § 5604, especially in view of the statute leaving attorney's fees to the agreement of the parties.

PARTITION—CONDEMNATION AWARD PAID TO CO-TENANT IN POSSESSION—TRUSTEE FOR CO-TENANTS. Where condemnation pro-

¹Reported in 75 Pac. 130.

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Citations of Counsel.

ceedings for a right of way are prosecuted against a co-tenant in possession, the public records showing that she was the owner of the land, and a sum is awarded and paid to her as the value of the land taken, when in fact she had inherited but a one-half interest therein, in an action subsequently brought for a partition, she should be held to account as a trustee to the other heirs who were not parties to the condemnation proceedings, whether they were concluded thereby or not, since they may treat it as valid.

SAME—DEFAULT OF HEIR. An heir who was made a party to the condemnation proceedings and suffered a default therein is not entitled to share in the proceeds of such award.

COMMUNITY PROPERTY—IMPROVEMENTS ON HUSBAND'S SEPARATE REAL ESTATE—REIMBURSEMENT TO SURVIVING WIFE. Where a husband and wife by their joint efforts add \$900 in value to the husband's separate real estate, upon the death of the husband without issue, the wife, as survivor of the community, is entitled to reimbursement from such separate estate, for the said value of the improvements made by the community.

Appeal from a judgment of the superior court for Skagit county, Neterer, J., entered October 28, 1902, after a trial on the merits before the court without a jury, granting a partition and ordering a sale of real estate, subject to certain liens in favor of the defendant Malena Legg. Modified.

Million & Houser, for appellants. In a partition courts of equity may make allowances for attorneys' fees irrespective of statutory provisions. *Schaefer v. Kienzel*, 123 Ill. 430, 15 N. E. 164; *Biles' Appeal*, 119 Pa. St. 105, 12 Atl. 833; *Cronkright v. Haulenbeck*, 35 N. J. Eq. 279; *Race v. Gilbert*, 102 N. Y. 298, 6 N. E. 592; *Lowe v. Phillips*, 21 Ohio St. 657; *Laird v. Walkinshaw*, (Pa.) 15 Atl. 898. The appellants are entitled to attorneys' fees as "costs of partition." Bal. Code, § 5604; *Redecker v. Bowen*, 15 R. I. 52, 23 Atl. 62; *Kilgour v. Crawford*, 51 Ill. 249; and cases *supra*. Where entire compensation is awarded on condemnation to one on the theory of sole

ownership, others interested may recover their shares. Lewis, Eminent Domain, § 627; *Harris v. Howes*, 75 Me. 436; *McAllister v. Reel*, 53 Mo. App. 81; *Haswell v. Vermont Cent. R. Co.*, 23 Vt. 228.

Fairchild & Bruce, for respondents.

PER CURIAM.—This was an action for the partition of real estate, commenced in the superior court of Skagit county by appellants, William D. Legg, Hattie Legg, Cassie Legg, Mary Legg, Lydia Staples, Arthur L. Heywood, Edgar A. Heywood, and William M. Lyden, against respondents, Malena Legg, Milo J. Legg, John Steen, and James White.

Joseph B. Legg, on the 8th day of March, 1873, made final proof, under the pre-emption laws of the United States, on the northwest quarter of the southwest quarter of section 22, township 36 north, range 3 east, in Skagit county, Washington. Patent issued for this land to said Legg on February 25, 1874. On the 22nd day of September, 1874, in Whatcom county, this state, Joseph B. Legg and respondent Malena Legg intermarried, and, from that date continuously till on or about June 1st, 1899, they occupied this property as their home. After their marriage, on June 20, 1884, Joseph B. Legg acquired title by patent to lot 3, section 21, in township 36 north, range 3 east, W. M., pursuant to the homestead laws of the United States.

On or about June 1st, 1899, Joseph B. Legg died, intestate, leaving as his heirs at law, his widow, Malena Legg; Lydia Staples, a sister; Cassie, Mary, and Hattie Legg, children of Charles H. Legg, a deceased brother; William M. Lynden, whose name was formerly William M. Legg, an only child of Edwin Legg, a deceased brother, whose name was changed by a decree of the probate court in

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Massachusetts from William M. Legg to William M. Lynden; Arthur F. and Edgar A. Heywood, only children of Eliza F. Legg-Heywood, a deceased sister; and William B. and Milo J. Legg, only children of William Legg, a deceased brother.

The trial court found, that, since June 1st, 1899, the date of the decease of Joseph B. Legg, respondent Malena Legg has been in the sole and exclusive occupation of the northwest quarter of the southwest quarter of section 22, above described; that the reasonable rental value thereof is \$225 per annum; that, at the time of the marriage of Joseph B. Legg with respondent Malena Legg, this land was of no other or greater value than \$500; that since their marriage said husband and wife resided upon, improved, and enhanced the value of said land by their joint efforts to the extent of \$900; that the present value thereof is \$2,000; that the rental value of such property, during the time it was occupied by intestate and Malena Legg, in excess of taxes paid, was \$100 per annum; that Malena Legg, at the time of the death of her husband, had no property of any kind or character except her community interests in the property above named; that she was not indebted to the community in any sum whatever; that, since the decease of Joseph B. Legg, Malena Legg has paid the expenses of the last sickness and funeral of her deceased husband and costs of administration of the estate amounting to \$150, the sum of \$111 general taxes, and \$43 in labor for road property tax assessed against said northwest quarter of the southwest quarter of section 22; that in 1901 the Seattle and Montana Railroad Company instituted proceedings to condemn a right of way through the real estate first above described, making Malena Legg, William D. Legg, James White, and John Steen defendants therein; that all of said parties defaulted in such proceedings, except Malena Legg,

who received from said railroad company, as compensation for her land, by virtue of said proceedings, the sum of \$940; that in such condemnation proceedings Malena Legg necessarily incurred expenses amounting to \$138; that in such proceedings appellants Hattie Legg, Cassie Legg, Mary Legg, Lydia Staples, Arthur F. Heywood, and William M. Lynden, were not made parties therein; that, after the decease of Joseph B. Legg, Malena was duly appointed by the superior court of Skagit county as administratrix of said decedent's estate; that she thereafter duly qualified in that behalf, and has since been discharged; that, at the time of the decease of Joseph B. Legg, he left sufficient personal property belonging to the community to have paid the expenses of his last sickness and funeral and the costs of administration.

The trial court further found: "That, so far as the public records show at the time said condemnation proceedings were pending, said Malena Legg was the owner of said property. That an order was made in said proceedings directing said \$940 to be paid to said Malena Legg, said order was made without notice to any of the plaintiffs [appellants]." The court also found, that \$100 is a reasonable fee to be allowed appellants' attorneys in case the same is a proper allowance as a part of the costs herein; that said property is so situated that a partition thereof cannot be made without great prejudice to the owners.

On these findings of fact the trial court made its conclusions of law, that respondent Malena Legg is the sole owner of said lot 3 in section 21 as the survivor of the community (Joseph B. and Malena Legg); that the appellants and respondent Milo J. Legg are the owners of an undivided one-half of the northwest quarter of the southwest quarter of section 22, township 36 north, range 3 east,

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and that Malena Legg is the owner of the remaining undivided one-half thereof; that this tract of land was the separate property of deceased Joseph B. Legg in his lifetime, which is the only land and property affected by these proceedings; that respondents Steen and White have no interest in the merits of this action; that no attorney fees on either side are chargeable against the common estate; that appellants and respondent Milo J. Legg have no interest, nor right to participate, in the money paid by the railroad company to Malena Legg; that she is entitled to a charge and prior lien upon this land, on account of improvements, in the sum of \$900, with interest added, aggregating \$1,165, with accruing interest thereon at seven per cent. per annum, and an additional charge of \$77, one-half of the total amount paid for taxes and betterments placed on the land; and that she is to be charged with \$337.50, one-half of the rental value of said lands for three years.

On October 28, 1902, the superior court rendered a decree ordering this tract to be sold. Out of the proceeds of such sale, Malena Legg was first to receive \$904.05, with interest at seven per cent. from date of decree; one-half of the residue of such proceeds was to be paid to Malena Legg, and the other half thereof to be paid to appellants and Milo J. Legg. Malena Legg was charged with one-half of the costs, and appellants and Milo J. Legg, with the other half. The court refused to tax any attorney fees as a part of the costs on either side. Plaintiffs allege exceptions, and appeal to this court.

Appellants contend that the trial court erred: (1) in not allowing them an attorney fee of \$100 as a part of the costs; (2) in refusing to allow them their share of the money received by respondents for the right of way from the railroad company; and (3) in allowing Malena Legg's

charges against this tract of land on account of improvements and taxes.

(1) Bal. Code, § 5604, provides:

"The costs of partition, including fees of referee and other disbursements, shall be paid by the parties respectively entitled to share in the lands divided, in proportion to their respective interests therein, and may be included and specified in the decree. In that case there shall be a lien on the several shares, and the decree may be enforced by execution against the parties separately. When, however, a litigation arises between some of the parties only, the court may require the expense of such litigation to be paid by the parties thereto, or any of them."

The question presented by appellants' counsel is whether the above provision authorizes the taxation of attorney's fees as a part of the costs in partition suits. Some of the authorities cited by appellants from other states hold that, under the general term "costs," attorney's fees may be taxed in partition cases; while the vast majority of courts treat this subject-matter as regulated wholly by statutory provisions, refusing to tax such fees unless specially named therein. The recovery of costs, by that name, was unknown to the common law till regulated by statute, in the courts of law. The allowance of costs in any case depended entirely on the terms of the statute. 5 Enc. Plead. & Prac. p. 110. This court, in *Trumble v. Trumble*, 26 Wash. 133, 66 Pac. 124, decided, in accordance with this rule—in enforcing a judgment lien for alimony in a divorce suit against certain property—that, when there was no provision for an attorney fee by the terms of the original decree, it was error to allow more than the statutory compensation as provided in Bal. Code, § 5165. We think the rule enunciated in that case on this subject is correct, and, when applied to the case at bar, would not authorize us in allowing the attorney fee which appellants now contend should be charged against

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the common estate of the parties to this controversy; more especially in view of the statute which provides that compensation of attorneys shall be left to the agreement of the parties.

(2) On the second contention, we are of the opinion that Malena Legg should account, under the findings of the trial court, to the appellants (excepting William D. Legg), as heirs at law of decedent, Joseph B. Legg, above named, who were not parties to the condemnation proceedings instituted by the Seattle and Montana Railroad Company, for their interests, respectively, as such heirs, in the money received by her from the railroad company, after deducting the expenses necessarily incurred in connection with such condemnation proceedings. The public records showed that, at the time of the condemnation proceedings, Malena Legg was the owner of the land taken as a right of way, and she received the money as the value of the real estate condemned, and not simply as payment for her interest therein. This seems to be the correct interpretation of the findings of the trial court in that behalf. If this be true, it is but fair and equitable that Malena Legg should be treated as a trustee for these heirs, with reference to their respective interests in that fund. Whether these appellants are concluded by the judgment of the superior court in the condemnation proceedings instituted by the railroad company, is not a material question in the controversy, as presented by this record. These appellants have the undoubted right to treat the proceedings as valid, and call upon Malena Legg for an accounting as their trustee. Appellant William D. Legg is not entitled to share in this fund, as he was a party to the condemnation proceedings, and defaulted therein.

(3) Appellants' counsel concede in their argument that respondent Malena Legg is entitled to a credit of one-half

of the \$154 paid for taxes, which inured to the benefit of the other heirs of deceased Joseph B. Legg, so no discussion of that question is necessary. We are of the opinion, however, that the trial court committed no error in allowing Malena Legg the sum of \$900 and interest, as a lien and charge against the land to be deducted from the proceeds of the sale, for betterments placed on the land during the existence of the community. The decedent and Malena Legg had, by their joint efforts and labors, added that sum to the value of this property. The appellants were not co-tenants of the land with Malena Legg at the time when these improvements were placed thereon by the community. They had no estate or interest in this property at that time. Their interests as heirs did not attach to the estate of Joseph B. Legg before the time of his death. In equity and fairness to Malena Legg, as the survivor of the community, she should be reimbursed for betterments placed on the land by the community, as against parties who contributed nothing towards improving the same or enhancing the value thereof.

In *Furrh v. Winston*, 66 Tex. 525, 1 S. W. 527, the court uses the following language: "It is well settled that separate estate of one member of the community must reimburse the community for any proper improvements made in good faith upon the separate estate with community funds." Citing *Rice v. Rice*, 21 Tex. 66; *Bond v. Hill*, 37 Tex. 626. See, further, *Clift v. Clift*, 72 Tex. 144, 10 S. W. 338. Applying this rule of law to the facts in the case at bar, Malena Legg, as survivor of the community, is entitled to reimbursement from the separate estate of Joseph B. Legg, decedent, as decided by the trial court.

The judgment of the superior court should be modified as indicated in this opinion, and the case is therefore re-

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manded with directions to the trial court to enter the proper decree. Neither appellants nor respondents shall recover costs on this appeal.

[No. 4562. Decided February 24, 1904.]

W. J. SHERLOCK *et al.*, Appellants, v. HENRY VAN ASSELT
et al., Respondents.¹

VENDOR AND PURCHASER—SALE BY AGENT—SPECIFIC PERFORMANCE—AUTHORITY OF AGENT—SUFFICIENCY OF EVIDENCE—FINDINGS—REVIEW. In an action for the specific performance of an agreement to convey land, made on behalf of an aged couple by their son upon a partial payment of \$100 to the son, findings in favor of the defendants will not be disturbed where the preponderance of the testimony is to the effect that the son was not authorized to make the sale, and the \$100 paid was not accepted but was tendered back by the son; since findings on conflicting evidence will not be disturbed unless against the weight of the evidence.

SAME—STATUTE OF FRAUDS—POSSESSION TO TAKE CASE OUT OF OPERATION OF STATUTE. In such a case specific performance should not be decreed where the contract was not acknowledged as required by the statute of frauds, and the plaintiffs did not enter into possession of the premises so as to take the case out of the operation of the statute.

Appeal from a judgment of the superior court for King county, Tallman, J., entered June 9, 1902, upon the findings and decision of the court in favor of the defendants, dismissing on the merits an action for the specific performance of a contract to sell land. Affirmed.

Allen, Allen & Stratton, for appellants.

McClure & McClure, for respondents.

PER CURIAM.—Plaintiffs, Walter J. Sherlock and Bridget Sherlock, his wife, commenced this action in the supe-

¹Reported in 75 Pac. 639.

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rior court of King county against defendants, Henry Van Asselt and Jane Van Asselt, husband and wife, to compel the specific performance of a contract for the sale of a five-acre tract of land, situate in that county. The trial court made the following findings of fact:

"(1) That on or about June 25, 1900, the defendants agreed to sell to the plaintiff W. J. Sherlock ten (10) acres of land situated in King county, Washington, being a part of the Henry Van Asselt donation claim, which ten (10) acres is particularly described as follows, to wit: beginning at a point being the intersection of the southeast corner of a tract or parcel of land known as that of and being occupied by the Denny Clay Co. and the west boundary line of the county road, thence westerly 1416 feet to the east bank of the Duwamish river, thence southerly along said river bank 308 feet, thence easterly 1416 feet to the county road, thence northerly 308 feet along the west line of said road to the place of beginning or commencement, comprising or containing ten (10) acres. And that on said June 25, 1900, defendants signed and acknowledged a deed conveying said ten (10) acres to plaintiff W. J. Sherlock, and gave said deed to J. H. Van Asselt for delivery to said Sherlock upon payment of the purchase price, or the sum of thirty-five hundred dollars (\$3,500).

"(2) That thereafter the said J. H. Van Asselt executed and delivered to the said W. J. Sherlock a certain agreement in writing, in words and figures as follows, to wit:

"\$1,500. Seattle, Washington, June 30th, 1900.

"Received from Walter J. Sherlock the sum of fifteen hundred (\$1,500) dollars, being a part of the purchase price of the ten (10) acres lying to the south of the Denny Clay Tract in the Van Asselt donation claim, King County, Washington, the balance of two thousand (\$2,000) dollars to be paid upon J. H. Van Asselt's furnishing an abstract of title and executing a deed to the said ten acres. The said abstract and deed to be furnished within ten days at which time the said Van Asselt is to give to the said Sherlock a lease on the five (5) acres lying to the south and adjoining the said ten (10) acres, for the period of one

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year, said lease to take effect on the 1st day of January, 1901, together with a bond to purchase the said five (5) acres at any time between the 1st day of January, 1901, and the 1st day of July, 1901, and the said lease and bond to expire on said day, said lease to provide for a monthly rental not to exceed \$20 per month.

“J. H. Van Asselt.”

“(3) That the said ten (10) acres mentioned in the said agreement set forth in the last preceding paragraph is the same ten (10) acres mentioned and described in paragraph 1 hereof.

“(4) That the said J. H. Van Asselt was not on said June 30, 1900, or at any time before or after June 30, 1900, authorized or empowered by the defendants Henry Van Asselt or Jane Van Asselt, or either of them, to sell to the said W. J. Sherlock, or said plaintiffs, the five (5) acres lying to the south and adjoining the said ten (10) acres, or any part thereof, nor was the said J. H. Van Asselt on the said 30th day of June, 1900, or at any other time, the agent of defendants, or either of them, for the sale of the said five (5) acres or any part of the lands of the Van Asselt donation claim.

“(5) That on or about the 31st day of October, 1900, the said W. J. Sherlock paid to the said J. H. Van Asselt the sum of one hundred dollars, but that said payment was not made on account of the purchase price of said five (5) acre tract, nor to the said J. H. Van Asselt as agent of the defendants, or either of them, and that said defendants have not, nor has either of them, at any time accepted, received or had the said sum of one hundred dollars, or any part thereof, and that said J. H. Van Asselt prior to the commencement of this action tendered and offered to pay to the said W. J. Sherlock the said sum of one hundred dollars (\$100), which tender and offer was refused by the said W. J. Sherlock.

“(6) That the said defendants have not, nor has either of them, at any time since the 30th day of June, 1900, ratified or confirmed or approved the said agreement mentioned in paragraph 2 of these findings.

“(7) That the plaintiffs, W. J. Sherlock and Bridget Sherlock, have not nor has either of them, taken or had

possession of or made any improvements whatever upon said five (5) acre tract."

On which findings the court stated the following conclusions of law:

"(1) That a decree should be entered herein dismissing said action, and that the defendants Henry Van Asselt and Jane Van Asselt should have judgment against plaintiffs for their costs and disbursements herein. (2) That the said J. H. Van Asselt should repay to the said W. J. Sherlock the said sum of one hundred dollars (\$100)."

Judgment was entered in favor of defendants in accordance with such conclusions of law, from which judgment plaintiffs prosecute their appeal to this court. After the appeal was taken Henry Van Asselt died, and his executrix, Jane Van Asselt, in her representative capacity, was substituted as a respondent herein in his stead by order of this court.

The main question presented in the record for our consideration on this appeal is one of fact: Was J. H. Van Asselt on the 30th day of June, 1900, or at any other time, authorized by respondents to execute to appellant Walter J. Sherlock the agreement, designated in the above finding of fact No. 2, for the sale of the five-acre tract in question? The testimony adduced at the trial shows, that J. H. Van Asselt, who signed the agreement, was a son of respondents; that the respondents were an aged couple, and that Henry Van Asselt, one of the respondents, was paralyzed. He did not testify in the case, and seems to have figured very little in the transaction; doing nothing further than to execute the deed to the ten acres of land contiguous to this five-acre tract, which is described in above finding No. 1.

Appellant Walter J. Sherlock testified that shortly prior to June 30, 1900, he went to the residence of respondents to ascertain who was the proper agent or party to sell the

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land designated in the findings as the entire fifteen acres. Witness said: "I spoke to them about buying the place, and Mrs. Van Asselt asked me if I was buying it for somebody. I told her then, 'No'; that I was buying it for myself. She told me whatever deal I made with Bud [the son] it was satisfactory to her. I asked her then if I would pay him the money; she said 'Yes'; she wanted to save all the commission; she didn't want to put it in any real estate man's hands to sell." Witness also said that Henry Van Asselt, the other respondent, was sitting in the same room at the time. Mrs. Van Asselt on the witness stand denied this conversation and particularly that her son had any authority from either of these respondents to sell any part of this land.

Mr. Sherlock, in explaining why the deed mentioned in the findings was made out for only ten acres instead of fifteen acres, testified: "We had agreed upon the price. I told him [J. H. Van Asselt, the son] I hadn't money enough to buy and pay for the fifteen acres there and then, and he asked me how much money—if I would pay for ten acres. I told him 'Yes'; and we agreed upon the price and terms, all of us, before ever I paid any money at all." He further testified that the \$100 was subsequently paid to the son in pursuance of the alleged contract for the sale of this five-acre tract, and that appellants had duly tendered \$1,400, the balance of the alleged purchase price, which was refused by respondents.

On behalf of respondents, the evidence tended to show that the purchase of the ten-acre tract was a complete and distinct transaction by itself. Jane Van Asselt and her son both testified, that the latter had no authority from respondents to make this contract for the sale of this five-acre tract, or accept any money in pursuance of such agree-

ment; that the respondents refused absolutely to accept the \$100 paid by appellant Sherlock. The son swore, that he offered to return this \$100 to appellant Walter J. Sherlock prior to this action, but that Sherlock would not accept it; that, when he signed the above contract and receipt, it was subject to his mother's approval, and that Mr. Sherlock was so advised at that time; that he (J. H. Van Asselt) was anxious that his mother should sell this land, but that she did not approve of his acts in that behalf.

Mrs. Van Asselt in her evidence is very positive that her son had no authority to make the alleged contract; that she reserved the right to fix the price of the land belonging to respondents; and that she did not want to sell this tract at all. The evidence decidedly preponderates in favor of respondents on the point that appellants never entered into or had possession of this five-acre tract, or made any improvements thereon under their alleged contract. The principal testimony on appellants' behalf as to the making of the contract was given by Walter J. Sherlock. His evidence is squarely in conflict with the evidence of respondent Jane Van Asselt and that of J. H. Van Asselt as to the making of the agreement, as well as to the alleged ratification of the acts of J. H. Van Asselt, who assumed to act in behalf of respondents.

This court has said in numerous decisions that it will not disturb the findings of the trial court on questions of fact, where the testimony is conflicting, unless the weight of evidence is against the findings of the trial court. See *Washington Dredging & Imp. Co. v. Partridge*, 19 Wash. 62, 52 Pac. 523; *Boardman v. Hager*, 24 Wash. 487, 64 Pac. 724; *Cullen v. Whitham*, 33 Wash. 366, 74 Pac. 581. Furthermore, this alleged contract was not executed with the legal formalities required by the statute of frauds. It

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was not acknowledged as provided in Bal. Code, § 4517. The appellants never entered into possession of this tract of land, under their agreement, in order to take the transaction in controversy out of the operation of the above statute. This matter of possession was a material issue in the present controversy, tendered by appellants, on which they assumed the burden of proof at the trial, and we think failed to establish their allegations in that regard.

The judgment is affirmed.

[No. 4821. Decided February 24, 1904.]

DAVID TOZER, *Appellant*, v. SKAGIT COUNTY, *Respondent*.¹

TAXATION—EXCESSIVE TAX—ACTION TO RECOVER—PAYMENT WHEN NOT VOLUNTARY. The payment of an excessive tax upon real estate under protest, after tendering a sufficient sum, which the treasurer refused to receive, giving notice at the same time that nothing less than the total sum would be accepted, is not a voluntary payment, and the tax payer may recover the amount illegally exacted, especially in view of the present statute making the tax a lien, and postponing its enforcement for three years (*Montgomery v. Cowlitz County*, 14 Wash. 230, overruled).

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered July 16, 1903, upon granting a nonsuit, dismissing an action to recover an excessive tax paid under protest. Reversed.

Million & Houser, for appellant.

J. C. Waugh, for respondent.

FULLERTON, C. J.—In this action the appellant sought to recover from Skagit county the sum of \$464.88, paid as

¹Reported in 75 Pac. 638.

taxes on certain lands belonging to him, situated in and subject to taxation in that county. The facts shown by the record, upon which the appellant bases his right to recover, are substantially these: In 1900 the lands mentioned were regularly assessed for taxation by the assessor of Skagit county, and their values duly equalized and fixed by the board of equalization for the ensuing biennial period. In 1901 the board conceived that the lands were not assessed at their actual value, and proceeded to and did, without notice to the appellant, raise the value of the lands between fifteen and twenty per centum over the valuation fixed in 1900. The auditor carried out the taxes for the year 1901 on the new valuation, increasing the tax on the property over what it would have been, had the valuation of 1900 been allowed to remain, by the amount above stated.

In March, 1902, the appellant tendered to the treasurer a sum of money sufficient to pay the taxes on the land at the valuations of 1900, which sum the treasurer refused to receive, notifying the appellant that he would not accept any sum in payment of such taxes less than the full amount shown by the rolls to be due thereon. The appellant thereupon paid the full amount assessed against the land, notifying the auditor that he paid the difference between the sum actually paid and the sum he would have been required to pay, had the assessment been made on the valuation of 1900, under protest, and that he would forthwith bring an action against the county to recover back the same. Thereafter he presented to the county his claim for the amount overpaid, and, on its rejection by the board of county commissioners, brought this action. On the trial he was nonsuited, and a judgment of nonsuit entered against him, from which judgment he appeals.

It is not disputed that, in so far as is shown by the record before us, the attempted increase in the valuation of the

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appellant's property was without authority, and therefore void; but it is contended that, under the rule heretofore laid down by this court, the payment was voluntary and cannot be recovered, even though the assessment be void; and it was on this ground that the trial court granted the nonsuit. The case which was thought to be controlling is *Montgomery v. Cowlitz County*, 14 Wash. 230, 44 Pac. 259. In that case we did hold that a payment of taxes to the county treasurer before they became delinquent, and before any proceedings were instituted looking to their enforcement, was a voluntary payment although nominally paid under protest, and could not be recovered back even if the tax paid was illegal. That case undoubtedly followed the rule as announced in a majority of the states having statutes similar to the one then existing in this state relating to the assessment and collection of taxes, and, if the statute had been suffered to remain as it then was, we would be content to follow it.

But a radical, if not fundamental, change has been made in the statute since the time of that decision. Then all taxes were personal and assessed against the person, and it was necessary to exhaust the personal property of the individual against whom the taxes were assessed before real property could be sold in satisfaction thereof; the statute especially enjoining the tax collector to "use due diligence and search to find said personal property." The delinquent list was placed in the hands of the sheriff for collection immediately after the taxes became delinquent, and that officer proceeded to enforce collection at once. It was thus possible, under that system, to have a determination of any question touching the legality of a tax within a reasonable time after the same became a lien on real property, and the rights of the taxpayer were not seriously jeopardized by being obliged to wait, before instituting a proceeding for

that purpose, until it was certain that the collecting officers would undertake to enforce collection of the tax.

But under the system for the levy and collection of taxes now provided by statute, taxes on land values are charged directly to the land, and not to the person of the owner, and the owner's personal property is not liable, nor can it be sold for the satisfaction of such taxes. While a period is fixed when penalties are added and taxes become delinquent, no active steps can be taken looking to the enforcement of the tax until three years after that time, and then only in the case where some individual has purchased the certificate of delinquency; the county itself not being permitted to enforce collection until five years have elapsed from date of delinquency, notwithstanding the law makes the tax a lien on the land from the first day of March in the year in which it is levied until it is paid. If, therefore, it be the rule that a land owner cannot contest in the courts the validity of a tax levy before active steps are taken to enforce its collection, the present law will in many instances prove a practical confiscation of property; for, no matter how unjust or how illegal the tax may be, the necessity of removing its apparent lien before the time the courts can take cognizance of it will compel its payment by the owner. While the state has the right to insist, and must insist, that each parcel of property bear its just proportion of the public burden, it requires no unjust exactions, and has no intent to frame its laws so as to require them, and we do not think such was the purpose of this statute.

But looking at the question from the state's point of view, it would seem that the change in the statute has made a change in the rule desirable. It is surely to the interest of the state, as well as the individual, that disputes concerning the validity of a tax be speedily determined. If payment of taxes in any considerable amounts is withheld,

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a deficiency is created, which results in the accumulation of interest bearing obligations, and the consequent diversion of money to the payment of interest on obligations which was intended to be, and should have been, applied to the obligations themselves. But, more than this, it is a matter of common knowledge that errors in the assessment and levy of taxes, even when sufficient to render the tax uncollectible, can be and generally are remedied when discovered within a reasonable time after they are made; while a discovery after a long delay usually results, not only in a total loss of the tax attempted to be levied, but in the loss of the amount of tax the property assessed in justice ought to pay.

It has seemed to us, therefore, that the change in the statute has rendered the case relied upon inapplicable; but if it be true, as the respondent argues, that no right distinction can be made between the statutes existing at the time the case above cited was decided and the present statute in regard to the time protest should be made, we think the change in the statute requires that the case be overruled. While to depart from precedent is always a serious matter, we can do it in this instance with less regret, as we think there was not much reason for the rule as applied to the former statute. The purpose of protest, under any system of taxation, is to give notice that the right to collect the tax is disputed. This is required that the state may not unwittingly receive payment of a tax to which it has no legal right, and thereby subject itself, against its will, to the costs of an action brought to recover it back. But it would seem that protest, made at a time when the tax was due and collectible and the state was actively engaged in receiving taxes, would be as effective to protect it from actions against its will as would a protest made when coercive measures were being taken to collect the tax. The officers

of the state have the same opportunity and legal right to inquire into the validity of the claim when made at the one time as they do when made at the other, and there is no sound reason for holding a payment of taxes made under the first condition to be voluntary and under the other to be coercive.

The judgment appealed from is reversed, and the cause is remanded with instructions to proceed to a trial on the merits.

HADLEY, MOUNT, and DUNBAR, JJ., concur.

ANDERS, J., concurs in the result.

[No. 4953. Decided February 26, 1904.]

JOHN O'CONNOR, *Appellant*, v. F. M. LIDTHIZER *et al.*,
Respondents.¹

APPEAL—DISMISSAL—PARTIES—SURETIES ON COST BOND WHEN NOT NECESSARY PARTIES—JUDGMENTS AGAINST. Without express statutory authority, a judgment can not be entered against sureties on cost bonds in the same action in which the bond is filed, but the sureties are entitled to their day in court, and are not parties appearing in the action upon whom notice of appeal need be served, in the absence of any judgment against them (*Brockway v. Abbott* [post], 74 Pac. 1069, overruled).

SAME—VOID JUDGMENT—APPEALABLE. Where the court had entered a void judgment against sureties on a cost bond, they may appeal, and they are accordingly necessary parties upon whom notice of appeal must be served.

VENDOR AND PURCHASER—SPECIFIC PERFORMANCE OF SALE—DEFENSES—CONTRACT INDUCED BY FRAUD—PAROL EVIDENCE CONTRADICTING WRITING TO SHOW FRAUD. In an action for the specific performance of a contract to convey land, an answer alleging fraud and false representations in procuring the written contract and showing a different consideration from that expressed, is not de-

¹Reported in 75 Pac. 643.

84	152
84	509
84	611
84	613
84	614
134	616
84	700
84	152
86	430
34	152
87	608
34	152
89	250
34	152
40	500

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murtable because it shows a different oral agreement varying the terms of the written contract, since oral testimony to vary the terms of a writing is admissible to show that it was induced by fraud and never became operative as a valid contract.

SAME—CONDITIONS PRECEDENT. The same rule applies to conditions precedent, parol evidence being admissible to show that the contract never took effect by reason of the failure of conditions which were to be first performed by the other party.

SAME—SUFFICIENCY OF ANSWER—FRAUDULENT REPRESENTATIONS AS TO FUTURE AND EXISTING FACTS. In an action for the specific performance of a written contract to sell land for the stated price of \$1,500, an answer alleging fraud in procuring the contract is not insufficient on the theory that the representations relate to future acts to be performed, where it is alleged that plaintiff represented that he was interested with T, a banker in a neighboring city, in the establishment of a bank and loan company for which the land was being purchased, and that upon the organization of the bank the balance of the purchase price, \$1,500, would be paid in stock in the bank, and that the defendant would be made president of the loan company at a salary of \$2,000 a year, all of which was false; since the false representations as to plaintiff's connection with T relate to existing facts which were inducements to entering into the contract.

SAME—DUTY OF VENDOR TO INVESTIGATE. Such answer is not insufficient on the theory that defendant might have investigated and ascertained the truth, where it appears that the representations were made at H, some distance from the city where the banker T resided, and that plaintiff was then at H claiming to represent T, since reasonable means for investigation were not at hand at the time.

Appeal from a judgment of the superior court for Lincoln county, Richardson, J., entered September 11, 1903, after a trial on the merits before the court without a jury, dismissing an action for the specific performance of a contract to convey real estate. Affirmed.

H. N. Martin and *Happy & Hindman*, for appellant. The plain terms of the writing expressing the consideration could not be varied by evidence of a parol contemporaneous agreement. *Milich v. Armour Packing Co.*, 60 Kan. 229,

56 Pac. 1; *Baum v. Lynn*, 72 Miss. 932, 18 South. 428; *Hubbard v. Marshall*, 50 Wis. 322, 6 N. W. 497; *Catlin v. Harris*, 7 Wash. 542, 35 Pac. 385; *Ross v. Portland etc. Spice Co.*, 30 Wash. 647, 71 Pac. 184; *Osburn v. Dolan*, 7 Wash. 62, 34 Pac. 433; *Tyson v. Neill* (Idaho), 70 Pac. 790; *Gordon v. Parke etc. Mach. Co.*, 10 Wash. 18, 38 Pac. 755; *Barnes v. Packwood*, 10 Wash. 50, 38 Pac. 857; *Staver & Walker Co. v. Rogers*, 3 Wash. 603, 28 Pac. 906. The representations related to future acts, and an action for fraud must be based on statements respecting past or existing facts. *Tacoma v. Tacoma Light & W. Co.*, 16 Wash. 288, 47 Pac. 738; *Farris v. Strong*, 24 Colo. 107, 48 Pac. 963; *Day v. Ft. Scott Inv. & Imp. Co.*, 153 Ill. 293, 38 N. E. 567; *Witt v. Cuenod*, 9 N. M. 143, 50 Pac. 328; *Langdon v. Dowd*, 10 Allen 433; *Jackson v. Allen*, 120 Mass. 64; *Sawyer v. Prickett*, 19 Wall. 146; *Gordon v. Butler*, 105 U. S. 553. The respondent was bound to investigate and ascertain the truth. *Washington Cen. Imp. Co. v. Newlands*, 11 Wash. 212, 39 Pac. 366; *Slaughter's Adm'r v. Gerson*, 13 Wall. 379; *West Seattle Land & Imp. Co. v. Herren*, 16 Wash. 665, 48 Pac. 341; *Samson v. Beale*, 27 Wash. 557, 68 Pac. 180; *Walsh v. Bushell*, 26 Wash. 576, 67 Pac. 216; *Griffith v. Strand*, 19 Wash. 686, 54 Pac. 613; *Sherman v. Sweeny*, 29 Wash. 321, 69 Pac. 1117.

Myers & Warren, for respondents.

HADLEY, J.—The appellant (plaintiff below) filed a bond in the superior court to secure costs. Respondents now move to dismiss this appeal on the ground that the sureties upon the cost bond were not served with notice of the appeal, and have not joined therein. In support of the motion we are referred to *Cline v. Mitchell*, 1 Wash. 24, 23 Pac. 1013; *Carstens v. Gustin*, 18 Wash. 90, 50 Pac. 933;

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State ex rel. Billings v. Port Townsend, 27 Wash. 728, 67 Pac. 1135; *Pierce v. Commercial Inv. Co.*, 30 Wash. 272, 70 Pac. 496, and *Brockway v. Abbott (post)*, 74 Pac. 1069.

We have arranged the cases above in the chronological order of the respective decisions, and the last three cases cited involve sureties upon cost bonds. In each of those cases the motion to dismiss the appeal was granted upon the theory that the principle followed in *Cline v. Mitchell* and *Carstens v. Gustin*, *supra*, applied to the later cases. No discussion appears in the later cases, but the former ones are merely cited as decisive of the question of dismissal. In the case at bar, and in others submitted at the recent term of this court, the contention was earnestly made that the later decisions above named were erroneous, and not controllable by the former ones mentioned. We therefore decided to re-examine the question.

In *Cline v. Mitchell* a bond had been given on appeal from justice court to the district court. The district court entered judgment against the sureties upon the appeal bond. This court held that they were properly parties to the judgment in the district court, and should have been served with notice of appeal. The district court was, however, expressly authorized by statute to enter the judgment against them, under § 1867 of the Code of 1881, which is as follows:

"In all cases of appeal to the district court, if on the trial anew in such court, the judgment be against the appellant, in whole or in part, such judgment shall be rendered against him and his sureties in the bond for the appeal."

The action in *Carstens v. Gustin* was one of claim and delivery. Personal property had been levied upon, and the claimant filed an affidavit of ownership, and gave bond under the terms of §§ 5262-5266, Bal. Code. Judgment

was entered in that proceeding against the sureties upon the bond, and it was held here that the sureties were parties to the judgment, and should have had notice of the appeal. The lower court was, however, expressly empowered to enter the judgment under the terms of § 5266, *supra*, as follows: “. . . but if he shall not maintain his title, judgment shall be rendered against him and his sureties for the value of the property, . . .” Thus in each of the cases of *Cline v. Mitchell* and *Carstens v. Gustin*, there was direct statutory authority for entering judgment against the sureties in the special proceedings there involved.

The only statutory provisions relating to the bond for costs in the superior court, of which we have any knowledge, are found in § 5186, Bal. Code. That statute makes no provision for the entry of judgment as of course against the sureties, in the same action in which the bond is filed. Without such express statutory authority as entering into, and becoming a part of, the contract in the bond, whereby the sureties consent to such judgment, we believe judgment cannot be entered against them; and they are not, therefore, parties appearing in the action upon whom notice of appeal is required, within the meaning of § 6504, Bal. Code. Not being persons against whom judgment may be entered as of course by statutory authority, they are entitled to their day in court. An attempt to enter an off-course judgment against the sureties is without notice and void; but one may appeal from even a void judgment for the purpose of having it judicially determined as void. When, therefore, the court has actually entered judgment against the sureties upon a cost bond, even though void, we believe the better rule to be that they shall be served with notice of appeal, in order that all who may appeal shall be joined.

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In *State ex rel. Billings v. Port Townsend*, and *Pierce v. Commercial Investment Co.*, *supra*, judgment was actually rendered against the sureties, but such was not the case in *Brockway v. Abbott*, *supra*. We think, for the reasons stated, that all the cases cited were properly decided, except *Brockway v. Abbott*, and that case is now overruled. In the case at bar there was no judgment against the sureties. It was therefore not necessary to serve them with notice of appeal, and the motion to dismiss is denied.

Appellant brought this action to enforce specific performance. On the 27th day of December, 1902, the respondent Lighthizer was the owner of certain real estate in the town of Harrington, in Lincoln county. On that day he signed and delivered to appellant an instrument in writing of which the following is a copy:

"In consideration of twenty-five dollars cash to me in hand paid and of the agreement to pay fourteen hundred and seventy-five dollars, on receipt of a deed and abstract showing good and sufficient title, I hereby agree to sell and convey to Mr. John O'Connor, the second room and building in the Empire block in Harrington, Wash., at an agreed price of \$1,500, fifteen hundred dollars, being the second room from the alley, and adjoining the postoffice in said block, this bargain and sale being subject to a certain mortgage of \$4,500, held by Baker & Baker of Walla Walla, Wash., mortgagees, and the fifteen hundred dollars is to be paid to Messrs. Baker & Baker, mortgagees, and to apply on the said mortgage of \$4,500. And the said mortgagees are to release the said sold property to the said John O'Connor, being a strip of ground sixteen feet wide and 100 ft. deep."

The complaint alleges the payment of the \$25 cash, the readiness and willingness of appellant to pay the remainder of the \$1,500, and the refusal of Lighthizer to convey the land. Other respondents were also made defendants on the theory that they are subsequent and fraudulent grantees

of Lighthizer and conspirators with him for the purpose of avoiding the conveyance claimed by appellant. The answer of Lighthizer denies the material allegations of the complaint, and affirmatively alleges, that appellant obtained said writing from him through fraud; that, on the day first mentioned, appellant came to the office of Lighthizer and represented that he desired to buy a building in which to start a bank and loan company; that he inquired the price of the property described in the writing set out above; that Lighthizer informed him he would sell the property for \$3,000; that appellant then stated that he and one Mr. Twohy, president of the Old National Bank of Spokane, were jointly interested in the banking business and in the establishment of a number of banks in Lincoln county, the chief of which was to be established at Harrington; that Mr. Twohy desired to procure a bank building in Harrington for as little cash outlay as possible, and would pay the balance of the purchase price in stock in the bank thereafter to be established; that, if Lighthizer would consent to sign a written contract for the consideration of \$1,500, the remaining \$1,500 would be paid in stock from the bank; that, as a further inducement to Lighthizer to sign the agreement, appellant represented that he had organized a loan company, and would establish its headquarters in the town of Harrington, and would make Lighthizer its president at an annual salary of \$2,000, which loan company was to be established in a room belonging to Lighthizer and adjacent to said bank; that all of said statements and representations were believed by Lighthizer and implicitly relied upon by him, while in truth they were false, and known by appellant to be false; that thereafter Lighthizer ascertained that appellant had no business relations or connections whatsoever with said Twohy; that appellant did not intend to establish any bank or loan com-

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pany in Harrington, and such has not been established; that Lighthizer thereafter returned to appellant the \$25 paid at the time the writing was signed, and afterwards, for a valuable consideration and in good faith, sold said property to respondent A. C. Billings.

A further affirmative answer of respondent Lighthizer is to the effect that said writing was signed and delivered to appellant upon the conditions, and not otherwise, that the contract should have no force or effect unless appellant should proceed immediately after its execution to organize a bank and loan company in the town of Harrington, should make Lighthizer president of such loan company at a salary of \$2,000, and should also deliver to Lighthizer stock in the proposed bank to the extent and value of \$1,500.

Appellant demurred generally to each of Lighthizer's affirmative defenses which have been substantially stated above. The demurrer was overruled as to each defense. Issue was joined by reply, and other defendants answered, denying the allegations of the complaint as to the conspiracy. The cause was tried by the court without a jury, and decree entered denying any relief to appellant, and adjudging costs against him. From that decree he has appealed.

It is first assigned that the court erred in overruling the demurrer to Lighthizer's first affirmative defense. It is urged that the defense presents a case of an attempt to contradict and vary the terms of a written instrument, and that it is apparent from the face of the pleading that proof thereof must be made by parol testimony. Whatever may be said of the averments of the pleading as to a contract different from that stated in the writing, it nevertheless does state that the contract was induced by fraud. If so, it

was void from the beginning, it never became a contract, and parol proof is permissible to establish the fraud.

"In other words, while parol evidence is inadmissible to vary or contradict the terms of a written instrument, such evidence is admissible to show that a writing in the form of a contract never became operative as a contract. This principle is generally approved by the authorities." *Reiner v. Crawford*, 23 Wash. 669, 671, 63 Pac. 516, 83 Am. St. 848.

Many authorities are cited in support of the above. In that case it was held, that oral evidence was admissible to show that a writing in the form of a contract was subject to a condition precedent to the attaching of any obligation thereunder; that, if the condition precedent failed, there was in fact no contract; and that such oral testimony did not vary the terms of any contract. The rule is equally as applicable here where the effect of the pleading is to aver that no contract ever existed because of fraud. Oral proof of fraud does not vary the terms of a valid written instrument, when the instrument involved was induced by fraud, and therefore never became a valid or operative one.

Appellant further urges that the pleading is bad as presenting a case for relief on the ground of fraud, in that its allegations relate to acts to be performed in the future, and not to present or past facts. It is true it does contain allegations as to future acts and, if it were confined entirely to these, the point urged would become serious. But it also contains averments as to existing facts which are very material. It alleges that appellant stated that Mr. Twohy desired to enter upon the banking and loaning enterprise in Harrington, and that appellant represented him for the purpose of effecting the necessary purchase, and was therefore associated with Mr. Twohy in the contemplated business. These statements as to Twohy, under the averments in the pleading, became inducements to make the writing in

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question. They related to existing facts, viz., that Twohy was then arranging to embark upon the business at Harrington, and that appellant was at that time duly authorized by Twohy to act in his behalf.

Appellant, however, further urges in this connection that Lighthizer should not have relied upon appellant's statement, but should have investigated the truth for himself before acting. Several decisions of this court are cited to the effect that one will not be granted relief from alleged fraud when it appears that the means for easily ascertaining the truth are at hand, and that the complaining party fails to avail himself thereof. But such conditions, we think, are not presented by this pleading. The pleading shows that Mr. Twohy was the president of a bank in Spokane, and while it is not expressly alleged that he was not in Harrington on that day, where Lighthizer could have communicated with him, yet in view of the allegations as to appellant's claim that he was in Harrington to represent Twohy, we think it sufficiently appears upon the face of the pleading, and as against demurrer, that the reasonable means for ascertaining the truth were not immediately at hand. We think, therefore, that the demurrer to the first affirmative defense was properly overruled.

It is next assigned that the court erred in overruling the demurrer to Lighthizer's second affirmative defense. That defense, it will be remembered, states that certain conditions precedent were to be performed before the writing in question should become an operative contract, and that such precedent conditions were not performed. This defense comes squarely within the rule of *Reiner v. Crawford*, *supra*, and which has already been discussed. Under that rule parol evidence is permissible here to show the conditions precedent, and if by reason of the failure of the conditions the writing never became an operative contract,

then the oral testimony does not contradict or vary the terms of a written contract.

It is next assigned that the court erred as to its judgment upon the facts. No specific findings of fact or conclusions of law were entered other than as contained in the decree itself. The decree simply denies appellant any relief, and judgment for costs is awarded against him. We have examined the evidence, and we believe that it is sufficient to support the decree of the court. We think it unnecessary to discuss the evidence here. It is sufficient to say that, while there is some conflict, we believe the evidence upon the subject of fraudulent representations and of conditions precedent, within the rules hereinbefore discussed upon demurrer, warranted the court's judgment.

The judgment is affirmed.

FULLETON, C. J., and MOUNT and ANDERS, JJ., concur.

[No. 4932. Decided February 27, 1904.]

THE STATE OF WASHINGTON, *on the Relation of the Prosecuting Attorney of King County, Appellant*, v.

CITY OF SOUTH PARK, *Respondent*.¹

QUO WARRANTO—AGAINST MUNICIPAL CORPORATIONS BY NAME—TESTING VALIDITY OF INCORPORATION—SUFFICIENCY OF COMPLAINT—PARTIES. Quo warranto does not lie against a municipal corporation to test the validity of the corporation election, since if it has no legal existence it cannot be sued, and the suit must be against the persons assuming to act in a corporate capacity.

Appeal from a judgment of the superior court for King county, Albertson, J., entered July 14, 1903, upon motion of the defendant after the opening statement of plaintiff's

¹Reported in 75 Pac. 636.

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counsel, dismissing an action to test the legality of the incorporation of the defendant. Affirmed.

P. C. Ellsworth and *J. E. McGrew*, for appellant, to the point that the action was properly brought against the corporation by name, cited: *State v. Atlantic Highlands*, 50 N. J. L. 457, 14 Atl. 560; *State v. Tracy*, 48 Minn. 497, 51 N. W. 613; *State v. Village of Bradford*, 32 Vt. 50; *People v. Riverside*, 66 Cal. 288, 5 Pac. 350; *Scrafford v. Gladwin County*, 41 Mich. 647, 2 N. W. 904.

Granger & Heifner, for respondent.

HADLEY, J.—This is a proceeding in the nature of quo warranto, the purpose of which, as stated in appellant's brief, is to "test the incorporation of respondent, and to determine whether it is properly incorporated as a city of the fourth class under the laws of Washington." The information charges irregularities as to notice and amendment of petition for incorporation; also that illegal votes were cast at the incorporation election, and that votes were illegally counted for incorporation. The answer denies these charges. At the trial the issues were narrowed by the statement of relator's counsel that they desired to present but two questions of fact: first, that ten ballots were wrongfully counted by the election board in favor of incorporation; and, second, that three illegal votes were cast by persons not residents of the territory sought to be incorporated. Counsel stated to the court that, when relator had established the above facts, he would ask that the incorporation be declared void. Thereupon the city moved for judgment in its favor, and for the dismissal of the action. The motion was granted, and judgment entered accordingly. This appeal is from that judgment.

This suit was brought against the corporation in its corporate name. No individual is made a party as assuming

to illegally discharge municipal functions. Section 5780, Bal. Code, enumerates the grounds for which an information in the nature of quo warranto may be filed. It may be filed against "any person or corporation," but all the subdivisions of the section relate to the usurpation of official or corporate functions by individuals, except the fifth, which relates to acts on the part of corporations by which they forfeit their privileges, or to the exercise of powers not conferred by law. In the latter case the information may be directed against the corporation, but it must recognize that the corporation has theretofore had a legal existence.

An information cannot be directed against a corporation which it charges does not exist. In such case there is no entity in existence upon which service can be made, or which can plead to the information. It is illogical to sue an alleged artificial person for the purpose of obtaining an adjudication that there is no such person. Either there is or is not a corporation. If there is not a corporation, it cannot be sued. The suit, then, must be against the persons who assume to act in a corporate capacity. By bringing suit against the corporation appellant admits its existence. The information therefore does not state facts sufficient to constitute a cause of action, since it simply seeks an adjudication that there is not now and never was such a corporation.

In *Ferguson v. Snohomish*, 8 Wash. 668, 36 Pac. 969, 24 L. R. A. 795, the appellant sought to remove an alleged cloud for illegal taxes on the ground that the city of Snohomish, which imposed the taxes, never had a legal existence. The attack against the corporate existence was in that case a collateral one, and this court, in holding that such a collateral attack could not be sustained, also gave a further reason for its decision as follows:

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"But we are of the opinion that the appellant is not in a situation to question the validity of the incorporation of the city of Snohomish, for the reason that he has brought his action against it as a municipal corporation and alleged it to be such in his complaint, . . ."

"But the weight of authority may now be regarded as sustaining the proposition that the effect of filing an information against a corporation by its corporate name to procure a forfeiture of its charter, or to compel it to disclose by what authority it exercises its corporate franchise, is to admit the existence of the corporation. When, therefore, the information is filed against the respondent in its corporate name and process is issued and served accordingly and the respondent appears and pleads in the same corporate character, its corporate existence cannot afterward be controverted." High's Ex. Leg. Rem. (3d ed.), § 661.

The following cases cited in Mr. High's valuable work as supporting the above we have examined and find to be in point: *People ex rel. Weber v. City of Spring Valley*, 129 Ill. 169, 21 N. E. 843; *State ex rel. v. Cincinnati Gas etc. Co.*, 18 Ohio St. 262; *State v. Commercial Bank etc.*, 33 Miss. 474; *Rolling Stock Co. v. People*, 147 Ill. 234, 35 N. E. 608, 24 L. R. A. 462; *People v. Stanford*, 77 Cal. 360, 18 Pac. 85, 19 Pac. 693, 2 L. R. A. 92. As being also directly in point see the following cases: *State v. Independent School District*, 44 Iowa 227; *Mud Creek Draining Co. v. State ex rel.*, 43 Ind. 236; *People v. Rensselaer etc. R. Co.*, 15 Wend. 113, 30 Am. Dec. 33; *State ex rel. Summers v. Uridil*, 37 Neb. 371, 55 N. W. 1072.

In *People v. City of Spring Valley*, *supra*, mention is made of the fact that some authorities seem to draw a distinction between private and municipal corporations, holding that an information may be brought against a municipal corporation by its corporate name, even where its corporate existence is challenged, the proceeding in such case being held to be against the city as a corporation *de facto*

and not as a corporation *de jure*. It was held, however, that no exception to the general rule exists in the case of municipal corporations. We are also unable to see any good reason in principle why such exception should exist unless a statute shall so declare.

For the foregoing reasons, the court did not err in granting the motion for judgment of dismissal. The judgment is affirmed.

FULLERTON, C. J., and ANDERS, MOUNT, and DUNBAR, JJ., concur.

[No. 4791. Decided February 29, 1904.]

RUSSELL & COMPANY, *Appellant*, v. O. A. STEVENSON
et al., *Respondents*.¹

COMPROMISE—CONSIDERATION—PAYMENT IN CASH OF SUM LESS THAN TOTAL—WHOLE DEBT NOT DUE. There is sufficient consideration for the settlement of notes by a cash payment of a less sum than the total, where part of the debt was not due and the settlement was acted upon.

PRINCIPAL AND AGENT—COMPROMISE—AUTHORITY OF AGENT. Where a collector was authorized to use his own judgment in making a settlement of an account, he had power to compromise it by accepting less than the total due.

COMPROMISE—MUTUAL MISTAKE—EVIDENCE—SUFFICIENCY. In an action to collect a balance due on notes, in which the defense is a settlement of the account by an agent of the plaintiff, a mutual mistake in the settlement entitling plaintiff to recover the amount of the mistake is shown, where it appears that the agent who was authorized to collect the account had an itemized statement, showing partial payments and credits, among which was a credit on one note of \$285.35 and upon another of \$214.65, being one payment of \$500, and which was not credited on the date of payment, that the defendant claimed a payment of \$500 not shown by the statement, and produced a receipt therefor, and that neither of the parties recognized the

¹Reported in 75 Pac. 627.

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Citations of Counsel.

aforesaid credits as such payment, and the agent allowed the claim for \$500, and settled the balance due, and on discovering the mistake, offered to return the money paid and gave notice that the settlement was rescinded.

SAME—MISTAKE AS TO ONE ITEM—WHEN DOES NOT AVOID SETTLEMENT. In such a case it is error to find that the mistake was due entirely to the negligence of plaintiff's agent, and it appearing that it did not affect the settlement of the other items of the account, the court should have found a mutual mistake that did not avoid the settlement, or entitle the plaintiff to rescind the same.

COMPROMISE—MUTUAL MISTAKE NOT AVOIDING THE SETTLEMENT—ACTION TO FORECLOSE CHATTEL MORTGAGES—JURISDICTION TO GRANT RELIEF FROM MUTUAL MISTAKE. In an action to foreclose chattel mortgages after an attempted rescission of a settlement, in which plaintiff sued for the full amount of the balance, and defendant based his defense upon the settlement in which a mutual mistake in allowing a credit of \$500 was made, the court has jurisdiction to enter judgment as the facts warrant, and where the mistake was not such as to avoid the settlement, should give judgment for \$500, without attorney's fees.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered March 26, 1903, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, dismissing an action to foreclose chattel mortgages. Reversed.

Crow & Williams, for appellants.

Danson & Huneke, for respondents, to the point that the court should not grant relief from the mistake, because of the agent's want of diligence, cited: *Stettheimer v. Killip*, 75 N. Y. 282; *Grymes v. Sanders*, 93 U. S. 55; *Fahie v. Pressey*, 2 Or. 23, 80 Am. Dec. 401; *Pickett v. Fidelity & Cas. Co.*, 60 S. C. 477, 38 S. E. 160, 629; *Brooks v. Hall*, 36 Kan. 697, 14 Pac. 236; *Woodford v. Marshall*, 72 Wis. 129, 39 N. W. 376; *Montgomery v. City Council*, 99 Fed. 825; *Pope v. Hoopes*, 90 Fed. 451.

MOUNT, J.—These actions were begun to foreclose four chattel mortgages securing several promissory notes. The complaints are in the usual form of foreclosure actions. After the service of the summons, the actions were consolidated upon motion of the defendants. The defendants thereupon answered, admitting the execution of the notes and mortgages, but denying that there was anything due thereon; and for an affirmative defense pleaded a settlement with the plaintiff and satisfaction of the notes and mortgages prior to the bringing of the action. The plaintiff for reply denied the settlement and alleged that, if any settlement had been made, it was procured by reason of false and fraudulent representations made by defendants, and that it was without consideration. Upon a trial the lower court found for the defendants, sustaining the plea of settlement and satisfaction, and dismissed the action. Plaintiff appeals.

The facts are substantially as follows: Appellant, Russell & Co., is engaged in the manufacture and sale of threshing machinery. It maintains a branch house at Portland, Oregon, a warehouse at Spokane, and agencies at other places. The branch house at Portland is in charge of Mr. A. H. Averill, who is a general agent of the company, and has general charge of all the business of the company in the states of Oregon and Washington, and controls all the agents in that territory. In the years 1898 and 1900 the respondents purchased certain threshing machinery from appellant, and, to secure the payment of the purchase price of such machinery, executed and delivered the notes and mortgages sued on herein. Some of the machinery so purchased was destroyed by fire after the purchase and some returned to appellant, and respondents purchased certain extras for repairs. Partial payments were made from time

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to time by respondents, which payments were credited to their account.

On or about October 20, 1902, one A. Mitchell, who was a traveling salesman for appellant, and who had charge of collecting the notes involved in this action, went to Rear-don, a town where appellant maintained an agency and near where respondent Stevenson was then residing, and demanded payment of the amount due on the notes. After some dispute as to the amount due, respondent Stevenson paid the said Mitchell \$300 on account of the indebtedness. Thereupon Mr. Mitchell requested from respondent Stevenson a settlement of the whole amount owing to appellant.

Mr. Mitchell at that time had in his possession an itemized statement of the whole account, showing the credits which appellant had given on the account, the amount due, and the amount not due. Mr. Stevenson disputed this statement, for the reason that certain machinery and extras returned had not been credited for their value; and also contended that a payment of \$500 had not been credited at all, and produced a receipt for that amount from the agent in charge of the Spokane office. This item did not appear on Mr. Mitchell's statement as a credit of \$500. It seems that, when the \$500 payment was made by Stevenson, it was credited upon two notes in separate items, one for \$285.35, and the other for \$214.65. Neither Mr. Mitchell nor Mr. Stevenson recognized these items as being the \$500 payment for which Stevenson claimed an additional credit.

At Mr. Stevenson's request, Mr. Mitchell deducted this \$500 from the amount of appellant's claim. Mr. Mitchell also made other deductions, for which Mr. Stevenson was in no wise at fault, and concluded that there was still owing from Mr. Stevenson to the appellant about \$1,100, a part of which was not then due. He then offered to settle and

satisfy the whole claim for \$900 cash. Mr. Stevenson proposed to pay \$800 in full settlement. Mr. Mitchell thereupon called Mr. Averill at Portland, Oregon, over the long-distance telephone, and stated that Mr. Stevenson had offered to settle the whole claim for \$1,100. This amount included the \$300 already paid and the \$800 offered. He also told Mr. Averill that the amount of principal owing on the notes was \$1,110. Mr. Averill replied that Mr. Mitchell should use his own judgment about the matter.

Mr. Mitchell thereupon agreed to settle and satisfy the whole claim for \$800, which Mr. Stevenson thereupon paid to Mr. Mitchell. Subsequently, on the same day, Mr. Averill discovered that the amount of principal on the account was largely in excess of \$1,110, and notified Mr. Mitchell not to settle on that basis. Afterwards, on the next day, Mr. Mitchell, having sent the money to Portland, Oregon, notified Mr. Stevenson that the settlement was rescinded and that his money would be returned. Mr. Stevenson objected to a rescission, and said he would not receive back the money. Within ten days thereafter Mr. Mitchell tendered the money back to Mr. Stevenson, and it was refused. Appellant then credited the \$1,100 upon the account, and sued for the balance, disregarding the settlement.

Appellant contends that there was no consideration for the settlement of the larger sum for a smaller one in cash, and that Mitchell had no authority to make the settlement. Neither of these contentions can be sustained. The whole of the debt was not then due, the settlement was made and acted upon, and the appellant received the money. *Brown v. Kern*, 21 Wash. 211, 57 Pac. 798; *Price v. Mitchell*, 23 Wash. 742, 63 Pac. 514; *Williams v. Blumenthal*, 27 Wash. 24, 67 Pac. 393. When Mr. Averill, the general agent, authorized Mr. Mitchell to use his own judgment in

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making the settlement, this was sufficient proof of Mr. Mitchell's authority to make the settlement.

We think the evidence fails to show any fraud on the part of respondents, or any bad faith, which would justify the setting aside of the settlement by the appellant. The evidence, however, is conclusive that there was a mutual mistake of \$500 made by respondent and Mr. Mitchell in reckoning up the account. Mr. Stevenson knew he had made a payment of \$500. He had a receipt therefor, which was shown to Mr. Mitchell. He found no credit of that amount on the itemized statement. He kept no books or accounts of his own, and does not appear to have been informed of the manner in which the credit was given. He was therefore justified in his belief that a mistake of \$500 had been made against him. Mr. Mitchell did not know that the \$500 payment had been separated into two items. These items did not appear to have been credited upon the date of the \$500 payment. He was therefore justified in believing and relying upon the statement of Mr. Stevenson that the \$500 had been paid, and had not been credited on the account. Both parties were mistaken, but, honestly believing that this item had been paid, were willing to settle, and did settle, upon that basis. This item was a material item of the account; but the mistake by which it was omitted does not appear to have influenced the settlement of other items of the account, which were agreed to and a settlement thereof effected upon a satisfactory basis. The mistake in this item is therefore not shown to have affected or stained the other items of the transaction. In such cases it has been held that a court of equity

"will allow the account to stand with liberty to the plaintiff to surcharge and falsify it; the effect of which is to leave the account in full force and vigor as a stated account, except so far as it can be impugned by the oppos-

ing party, who has the burden of proof on him to establish errors and mistakes." 1 Story's Eq. Jur. (13th ed.), § 523.

See, also, *McDougall v. Cooper*, 31 N. Y. 498; *Carpenter v. Kent*, 101 N. Y. 591, 5 N. E. 787; *Conville v. Shook*, 144 N. Y. 686, 39 N. E. 405; *Reid v. Beyle*, 39 Kan. 559, 18 Pac. 614; *Reed v. Horn*, 143 Pa. St. 323, 22 Atl. 877; *Rehill v. McTague*, 114 Pa. St. 82, 7 Atl. 224, 60 Am. Rep. 341.

It is true that this case was not brought in the form of an action to correct the account. The action was brought to foreclose the mortgage for the full amount claimed to be due thereon. The appellant entirely ignored the settlement. Respondent relied upon the settlement, and based his defense thereon. The court had jurisdiction of the parties and of the subject matter, and was, therefore, under the practice, authorized to enter such judgment as the facts warranted. The court found that a mistake of \$500 was made in calculating the amount due, but that this mistake was due wholly to the negligence and carelessness of appellant's agent. With this finding we cannot agree for reasons hereinbefore stated. The court should have found that the mistake was a mutual one, but one which did not avoid a settlement, and should have entered a judgment in favor of the plaintiff for the amount thereof, and for costs, but without attorney's fees.

The judgment is therefore reversed, and the cause remanded to the lower court, with instructions to enter a judgment in favor of appellant for \$500, with interest from October 20, 1902, at the legal rate, together with the costs of the action; appellant to recover the costs of this appeal.

FULLERTON, C. J., and HADLEY, ANDERS, and DUNBAR, JJ., concur.

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[No. 4817. Decided February 29, 1904.]

S. A. REID, *Appellant*, v. C. W. SLOCUM *et al.*, *Respondents*.¹

VENDOR AND PURCHASER—SPECIFIC PERFORMANCE OF CONTRACT TO CONVEY—DEFENSES—MUTUAL MISTAKE INCLUDING LAND NOT OWNED—EVIDENCE—SUFFICIENCY. In an action for the specific performance of a contract to sell a tract of land purchased for the timber thereon, in which the defendants claim that ten acres previously sold by them to another, and which was cleared land and occupied, was included by mutual mistake, findings for the defendant will not be disturbed where the plaintiff testifies that he was familiar with the land, knew of the other purchaser's house and improvements, and did not think at the time that he was getting the house and land around it.

Appeal from a judgment of the superior court for Clarke county, A. L. Miller, J., entered April 3, 1903, upon the findings and decision of the court in favor of the defendants, dismissing on the merits an action for the specific performance of a contract to convey land. Affirmed.

E. M. Green, for appellant.

W. W. McCredie, for respondents.

MOUNT, J.—Plaintiff brought this action in the lower court to enforce specific performance of a contract of purchase of real estate. The complaint sets up the contract, and alleges a compliance therewith on the part of the plaintiff and a refusal by defendants to convey the lands described by the contract. Defendants by their answer admit the making of the contract, but allege that they were not, at that time, and are not now, the owners of all the lands therein described; and that ten acres of land, not owned by them and not intended to be

¹Reported in 75 Pac. 679.

sold by them, and which plaintiff did not intend to purchase, were, by mutual mistake, included in the contract; and also allege a readiness and offer to comply with the contract, as the same was intended to be made by all parties thereto, and ask for reformation of the contract sued upon. The reply denied the allegations of the answer. At the trial the court found in favor of the defendants. Plaintiff appeals.

The only question involved on this appeal is one of fact, viz: was there a mutual mistake made by the parties in describing the lands which they intended to include in the contract? We have carefully examined the evidence, and are convinced that the finding of the lower court on this question was right. The whole tract of land described in the contract is a rectangular tract containing eighty-seven and one-half acres. It is described in the contract as follows: "Beginning at the northeast corner of the Michael Hartigan homestead claim 334, running thence south 30 chains, thence west 29 chains and 15 links, thence north 30 chains, thence east 29 chains and 15 links to the place of beginning, containing eighty-seven and one-half acres of lands." Before defendants acquired the title to this tract of land they held a mortgage upon it. In order to avoid foreclosure of the mortgage, they took a deed from the mortgagors for the whole tract, and immediately, as a part of the same transaction, reconveyed to a Mrs. Laws ten acres in rectangular form out of the southwest quarter of the tract. This ten acres was cleared and improved land upon which Mrs. Laws lived. The balance of the tract was timber lands. The controversy here is over this ten acres. When plaintiff and defendants entered into the contract involved in this action, the whole tract was described without excepting therefrom this ten acres.

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There can be no doubt at all from the evidence that the defendants did not intend to include this ten acres in the contract of sale with the plaintiff. The only possible question in the case is whether the plaintiff intended to purchase, and thought at the time the contract was drawn that he was purchasing, this ten acres, in addition to the seventy-seven and one-half acres owned by defendants. We are of the opinion that his own evidence discloses the fact that he knew he was not to have this ten acres. He testified, in substance, that at the time the contract was entered into he was in the wood business; that he bought the land for the timber upon it; that he had known the ten acre tract for two or three years prior to the time of the contract; that he knew where Mrs. Laws lived; and that, when he purchased the land, he did not think he was getting the house and land around it. There are other strong circumstances in the case tending to show that plaintiff intended to purchase the land owned by the defendants, which contained but seventy-seven and one-half acres. But the foregoing evidence of the plaintiff himself is conclusive of the question.

The judgment is therefore affirmed.

FULLERTON, C. J., and HADLEY, ANDERS, and DUNBAR, J.J., concur.

[No. 4857. Decided February 29, 1904.]

J. J. BROWN *et al.*, Appellants, v. J. D. CALLOWAY,
*Respondent.*¹

APPEAL—NOTICE—SUFFICIENCY—DISMISSAL. A notice of appeal reciting that appellants hereby give notice of their application to appeal to the supreme court, is not so defective as to warrant a dismissal in view of Laws 1899, p. 79, § 1, providing that no appeal

¹Reported in 75 Pac. 630.

84	175
84	309
84	547
85	657

shall be dismissed for any informality or defect in the notice if the appellant shall, upon order, perfect the appeal.

APPEAL—BRIEFS—ASSIGNMENT OF ERRORS—SUFFICIENCY. Briefs will not be struck out and the case affirmed for failure to clearly point out each error, where but one error is relied on, and that is stated clearly at the close of the statement of facts.

EJECTMENT—QUIETING TITLE—ATTEMPT TO STATE SEVERAL CAUSES OF ACTION—ELECTION BETWEEN. Where plaintiffs undertake to state two separate causes of action for the recovery of real estate, one for equitable relief to remove a cloud from the title, without alleging who was in possession, and the other to recover possession alleging that the defendant is in, and unlawfully withholds, possession, it is error to require the plaintiff to elect between the two causes on the theory that the equitable cause is not maintainable without possession, and so is inconsistent with the other, since the first cause does not allege possession in the plaintiff, and it was unnecessary under the statute to split up the action into legal and equitable causes, and in fact but one cause is stated.

PLEADINGS—ATTEMPT TO STATE SEVERAL CAUSES OF ACTION—ELECTION BETWEEN CAUSES—REMEDY MISCONCEIVED. Where plaintiff endeavors to state equitable and legal causes as separate causes of action, and in fact but one cause is stated, it is error to require an election and to dismiss the case for failure to elect between the two causes, since a party is not to be turned out of court because he misconceived his remedy, the substance controlling the form of it, and the court should have regarded all the facts stated as one cause, without reference to the erroneous division in the complaint.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered April 21, 1903, dismissing an action to recover the possession of real estate and to remove a cloud, upon the plaintiffs' refusing to elect between two causes of action attempted to be set up in the complaint. Reversed.

Hartson & Holloway, for appellant.

Graves & Graves, for respondents.

MOUNT, J.—Respondent moves to dismiss this appeal for the reason that the notice is not sufficient. The part

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of the notice to which objection is made is as follows: "You are hereby notified that the plaintiffs in the above entitled action hereby give notice of their application to appeal to the supreme court," etc. The statute provides, at § 6503, Bal. Code, that a party desiring to appeal from a judgment or an order shall give notice "that he appeals from such judgment or order to the supreme court," etc.; and it is argued that a notice of an application to appeal is not a notice of appeal. There is no such practice in this state as an application for an appeal. The appeal goes as a matter of course, when notice is given and bond filed. No order or allowance of the appeal is necessary, and none was asked for or made in this case. Laws 1899, p. 79, § 1, provides: ". . . and no appeal shall be dismissed for any informality or defect in the notice of appeal, the appeal bond, or the service of either thereof, or for any defect of parties to the appeal, if the appellant shall forthwith, upon order of the supreme court, perfect the appeal." The respondent was not misled by this notice. He knew what was intended, and had sufficient notice of the appeal. The judgment appealed from was described with certainty. We think we would not be justified in dismissing the appeal, under the statute named. *Ranahan v. Gibbons*, 23 Wash. 255, 62 Pac. 773; *In re Murphy's Estate*, 26 Wash. 222, 66 Pac. 424. There is no necessity for an order upon the appellant to correct the defect.

Motion is also made to strike the brief of appellants and affirm the case, because each error is not clearly pointed out as required by Rule 8. But one error is relied upon, viz.: that the trial court compelled the appellants to elect between two alleged causes of action, and this is the only question discussed on the appeal. It is true that this error is not stated separately from the "statement of facts," but it is stated clearly at the close

thereof, and for that reason the motion should be and is denied.

The complaint in form attempts to set out two separate causes of action. For the first it is alleged, that one Edward Quinn died in 1892, seized of certain described real property in Spokane county; that title thereto passed by descent to one Bridget Brown, and upon her death in 1901 it passed to the plaintiffs, her sole heirs; that in 1895 a mortgagee of the premises, under a mortgage made by said Quinn, commenced an action to foreclose his mortgage, making no one a party but the administratrix of Quinn's estate; that the foreclosure proceedings, which are set out in full, culminated in a judgment of foreclosure and a sale of the mortgaged property to the mortgagee; that the defendant claims some title to the premises by virtue of mesne conveyances from the purchaser at said sale; that this claim, and the foreclosure proceedings and conveyances upon which it is based, are a cloud upon plaintiffs' title. It is not alleged in this cause of action who was in possession of the property.

The complaint then, "for a further and separate and second cause of action," alleges substantially, that plaintiffs' ancestor, Bridget Brown, was, on December 2, 1895, the owner and in possession of the property described (the same as in the first cause of action), and that in 1900 the defendant took possession of said realty without right, and has ever since held it; that in 1901 said Bridget Brown died, and that plaintiffs are her sole heirs and are entitled to possession of said realty; that plaintiffs have been damaged in the sum of \$300 on account of being deprived of said real estate. The prayer is for a decree quieting title to the realty in plaintiffs, for \$300 damages, and for general relief.

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It appears to be conceded in the briefs that a demurrer to each of these causes of action was denied, but no record thereof appears in the transcript. Subsequently an order was made by the court, upon motion of the defendant, requiring the plaintiffs to elect upon which of the stated causes of action they would proceed. Plaintiffs refused to make the election, and the court thereupon dismissed the action. Plaintiffs appeal from this order of dismissal.

The only question presented on this appeal is whether or not the court erred in requiring plaintiffs to elect between the causes of action stated, and to proceed upon one without regard to the other. The court below evidently sustained this motion upon the theory that two separate inconsistent causes of action were stated in the complaint. In *Povah v. Lee*, 29 Wash. 108, 69 Pac. 639, this court held that a party out of possession of real property could not maintain an equitable action to remove a cloud and quiet title to such realty, but the remedy of a person out of possession was to bring an action under the provisions of §§ 5500-5508, Bal. Code, for possession of the property, and in that action set up his title; so that the court in one action may determine the superior title, both legal and equitable, of the contending parties.

Under these statutes it is not necessary for a plaintiff to split up a cause of action into legal and equitable causes and state them separately. It is only necessary to state the facts. Under the rule in *Povah v. Lee*, in order to state facts sufficient to constitute an equitable cause of action to remove a cloud from the title, it is necessary to allege possession in the plaintiff, or that the property was not in the possession of any one. In order to state a cause of action for possession of realty, it is necessary to allege that the plaintiffs are wrongfully and unlawfully

dispossessed of the property. It will thus be seen that, when the plaintiffs in this case undertook to state two separate causes of action, one asking for the removal of a cloud from the title, and the other for possession of the property, the two causes as stated were necessarily inconsistent, because by the one plaintiffs must be in possession and by the other they must be out of possession. Plaintiffs however, in stating their first cause of action, did not allege which of the parties was in possession. In stating their so-called second cause, they allege that defendant is in possession. It is apparent from reading the complaint that the pleader undertook to state a cause of action for possession, and to set forth the nature of the plaintiffs' estate and claim and title to the property under the statutes above referred to, and this has been done in the two causes when they are taken together and read as one. The pleader evidently endeavored to bring himself within the provisions of the statute above cited, but, unfortunately, thinking that the facts entitling him to equitable relief must be set up separately from those entitling him to legal relief, stated his facts as two separate and distinct causes of action, when in fact he has but one cause.

This court has said, under the liberal rules of pleading contained in the statute, that "if the plaintiff sets forth facts constituting a cause of action and entitling him to some relief, he is not to be turned out of court because he has misconceived the nature of his remedial right." *Damon v. Leque*, 14 Wash. 253, 44 Pac. 261; *Watson v. Glover*, 21 Wash. 677, 59 Pac. 516; *Yarwood v. Johnson*, 29 Wash. 643, 70 Pac. 123. We might add that the substance of the facts stated in a complaint will control the form of it, and the court will construe all the facts stated without reference to the number of causes of action

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into which the pleader may have erroneously divided his complaint. The result of the order of the court requiring the plaintiffs to elect upon which cause of action they would proceed has been to deprive the plaintiffs of their remedy under the statute. This was error. The court should have disregarded the statement in the complaint that there were two causes of action, and treated the complaint as stating but one cause.

The judgment of dismissal is therefore reversed, with instructions to the lower court to reinstate the action for further proceedings. Since the error herein was the result of the confused condition of appellants' pleadings, the costs of the appeal should abide the result of the action in the court below.

FULLERTON, C. J., and HADLEY, ANDERS, and DUNBAR, JJ., concur.

[No. 4506. Decided February 29, 1904.]

ROYAL C. NELSON, *Respondent*, v. F. McLELLAN, *Appellant*.¹

APPEAL—COSTS—DISBURSEMENTS FOR MAKING TRANSCRIPT—PER FOLIO CHARGE. In taxing the costs of an appeal, not more than ten cents per folio can be allowed as disbursements for stenographer's fees in making a transcript of the evidence, under Laws 1893, p. 132.

SAME—TAXATION OF COSTS—ESTIMATING FOLIOS IN TRANSCRIPT. Where no actual count of the folios was made, the clerk's estimate made by counting the folios on several pages and taking the average should prevail over a general average for similar class of work.

Motion by appellant to retax the costs. Denied.

¹Reported in 75 Pac. 635.

Roberts & Leehey, for appellant.

Preston, Carr & Gilman and *J. W. Rayburn*, for respondent.

FULLERTON, C. J.—The judgment appealed from in this cause was reversed, and costs were awarded to the appellant. 31 Wash. 208, 71 Pac. 747. In taxing these costs the clerk found the transcript to contain 1,211 folios, and allowed therefor the sum of \$121.10, being at the rate of ten cents per folio. The appellant excepts to the amount allowed, and shows that he actually paid a stenographer for a transcript of the evidence the sum of \$200, and asks that he be reimbursed in this amount for this item. He contends, (1) that the amount allowed by the clerk, viz., ten cents per folio, is less than the statute authorizes; and (2) that the clerk miscounted the folios, allowing only two and one-half folios to the page, while the stenographer charged him for three.

That part of the statute regulating the costs to be allowed on appeals to this court reads as follows:

“Costs shall be allowed in the supreme court, irrespective of any costs taxed in the case in the court below, to the prevailing party in the supreme court, on any appeal in any civil action or proceeding as follows: The fees of the clerk of the supreme court paid by the prevailing party, the fees of the clerk of the court below for preparing, certifying and sending up the records on appeal, or any supplementary record, paid by the prevailing party, and twenty-five dollars attorneys’ fees, besides his necessary disbursements for the printing of briefs, and any sum actually paid or incurred by the prevailing party as stenographer’s fees, not exceeding ten cents a folio, for making a transcript of the evidence or any part thereof included in the bill of exceptions or statement of facts. . . .” Laws of 1893, p. 132, § 29.

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It seems to us that this statute is so plain as to leave no room for doubt as to its meaning. The statute has two limitations: if the amount paid or incurred as stenographer's fees is less than ten cents per folio, only the amount so paid or incurred can be recovered as costs; but, if the amount paid or incurred equals or exceeds ten cents per folio, the amount to be recovered is limited to ten cents per folio.

It may be true, as the appellant contends, that this sum will not reimburse him for the amount of his actual outlay, but that is not a matter with which the court can concern itself. The regulation of court costs is for the legislature, and that body must be appealed to if the costs allowed by it are either burdensome or insufficient; the courts can do no more than follow its mandate, so long as it acts within its constitutional powers.

As to the second question, neither the appellant nor the clerk determined the number of folios by actual count. While the appellant does not make the method by which he estimated the number very clear, it seems, from the affidavits filed, that three folios per page was taken as the average because it was found that such was the general average of similar work. The clerk made his estimate by counting a number of pages of the transcript and taking the average of these as an average for the whole. This latter method, it seems to us, is more apt to be correct for the particular work, and we shall for that reason allow his estimate to stand.

The motion to retax is denied.

HADLEY, MOUNT, and ANDERS, JJ., concur.

[No. 4676. Decided February 29, 1904.]

RUSSELL G. BELDEN, *Respondent*, v. S. S. KROM, *Appellant*.¹

SALES—FAILURE OF VENDOR TO DELIVER—MEASURE OF DAMAGES.
Upon a sale of personal property and payment of the purchase price, the measure of damages for failure of the vendor to deliver the property is its market value at the time of the default.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered December 26, 1902, upon findings in favor of the plaintiff for \$1,475 damages for breach of contract, after a trial before the court, a jury being waived. Affirmed.

E. M. Heyburn, for appellant.

Crow & Williams, for respondent.

MOUNT, J.—This action was brought by the plaintiff to recover from defendant the value of certain stock which defendant sold and agreed to deliver to plaintiff's assignor. Plaintiff had judgment below, and defendant appeals. Upon the trial the court found, that on August 16, 1902, for a valuable consideration then and there paid by one Worth Belden, defendant sold and agreed to deliver to said Belden certain shares of the capital stock of the New Century Drug Company; that Worth Belden subsequently assigned the said agreement to the plaintiff, who demanded the said stock, and defendant refused to deliver the same; that the value of the stock at the time of the contract, and when demand therefor was made, was \$1,475. Judgment was thereupon entered against defendant for that amount.

But one question is presented on this appeal, and that

¹Reported in 75 Pac. 636.

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is the measure of plaintiff's damages. Appellant contends that the measure of damages is the consideration paid, together with such special damages as are shown. This is the rule adopted by this court in reference to the sale of real estate where there is a breach of covenants of warranty, as in *Morgan v. Bell*, 3 Wash. 554, 28 Pac. 925, 16 L. R. A. 614, and *West Coast Mfg. & Inv. Co. v. West Coast Imp. Co.*, 31 Wash. 610, 72 Pac. 455. But where there is a sale of personal property, and payment of the purchase price, and thereafter a refusal by the vendor to deliver the property, the measure of damages is the market value of the property at the time of default. 24 Am. & Eng. Enc. Law (2d ed.), 1150; 2 Sutherland, Damages (2d ed.), §§ 651-656; 2 Sedgwick, Damages (8th ed.), §§ 734-736; *Saunders v. U. S. Marble Co.*, 25 Wash. 475, 65 Pac. 782. This rule was adopted by the lower court.

The judgment is therefore affirmed.

FULLERTON, C. J., and HADLEY and ANDERS, JJ., concur.

[No. 5040. Decided February 29, 1904.]

THE STATE OF WASHINGTON, *on Relation of William Jensen et al., Plaintiff*, v. W. R. BELL, *Superior Judge etc., et al., Respondents.*¹

JUDGMENT—EVIDENCE OF—JOURNAL ENTRY CONTROLLED BY SIGNED ORDER. Where the clerk's brief entry on the minutes, entered on the day that the court orally announces its decision, is inconsistent with the formal order of the court signed and filed a few days later, the latter controls, and must be considered the evidence of the real and final act of the court on the subject.

SAME — INJUNCTION — CONSTRUCTION — PROHIBITION AGAINST THREATENED PUNISHMENT FOR CONTEMPT. Where a judge threat-

¹Reported in 75 Pac. 641.

ens to punish as for contempt the sale of beer in no way enjoined by the terms of the signed judgment of the court, a writ of prohibition will issue preventing such action, although the clerk's journal entry of said judgment does enjoin such sale, and the judge claims that the journal entry correctly expressed the decision.

Application to the supreme court filed January 16, 1904, for a writ of prohibition against the threatened punishment of the relators for contempt in disobeying an order of the superior court for King county, Bell, J., entered January 8, 1904, enjoining the sale of certain beer. Writ granted.

Ballinger, Ronald & Battle and Vance & Mitchell, for relators.

G. M. Emory and Harold Preston, for respondents.

HADLEY, J.—This is an original application in this court for a writ of prohibition directed to the superior court of King county and to the Honorable W. R. Bell, one of the judges thereof, and also to the Seattle Brewing & Malting Company, a corporation. An alternative writ was issued, and return thereto was made.

The case presented here is as follows: On the 8th day of January, 1904, a cause was pending in the superior court, wherein the Seattle Brewing & Malting Company, one of the respondents here, was plaintiff, and the relators here were defendants. An application was made in that action by said plaintiff for the appointment of a receiver of a certain leasehold interest in controversy, and also for a temporary injunction against the said defendants. On the said 8th day of January the respondent Bell, as said judge, having heard the aforesaid application, orally announced his decision thereon. In the minutes of the court's proceedings, made by the clerk on that day, the following appears:

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"Seattle Brewing & Malting Company, vs. Wm. Jensen et ux. No. 41455. Plffs. mo. for appointment of receiver granted. Court enjoins the defts. from selling any domestic beer except Rainier beer.—Supersedeas bond & bond on injunction fixed at \$5,000. each. Ex. allowed."

Thereafter, on the 12th day of January, the said judge signed a formal order in the premises, and the same was spread upon the records of the court. Among other things contained in the order, the following appears touching the purchase and sale of beer other than Rainier beer:

"And It Is Hereby Further Ordered that the above defendants, William Jensen and Hulda Jensen, together with the attorneys, agents, servants and employes of each of said defendants, and all persons claiming under, by, or through them, subsequent to the making of this order by the court on January 8, 1904, be, and they hereby are, restrained and enjoined from purchasing from any person whomsoever, any beer, except beer imported from outside the limits of the United States of America, to be sold or offered for sale by said defendants, or either of them, in or about the carrying on of the saloon and restaurant business formerly and now operated in the premises referred to hereinabove;

"And it is further ordered that said defendants, William Jensen and Hulda Jensen, together with their attorneys, agents, servants and employes, and all persons claiming under or through them, be, and they hereby are, directed and commanded, with reference to purchases subsequent to January 8, 1904, by this order to purchase from said Seattle Brewing & Malting Company, all beer, except imported beer, as above defined, to be sold or offered for sale by said defendants, Jensen, or either of them, in carrying on said saloon and restaurant business in said premises."

It will be observed that, in the clerk's minute entry, the statement is made that the defendants are enjoined from selling any domestic beer except Rainier beer; but in the formal order, afterwards signed by the court, the injunction pertains only to purchases subsequent to January 8, 1904, and no prohibition is declared against selling such

other domestic beer as may have been purchased by the defendants prior to said date.

Acting under the terms of the formal order of the court, the relators here were about to sell such domestic beer as they had on hand, and which had previously been purchased from others than the respondent Seattle Brewing & Malting Company. At this juncture the respondent Bell, as judge aforesaid, threatened to punish these relators as for contempt, if they should proceed to make such sales; he claiming that the minute entry of the clerk correctly records the court's actual decision and order in the premises. The relators then applied to this court for a writ of prohibition to prevent such course on the part of said respondent, and also to prevent interference by the co-respondent with the making of sales by relators, as aforesaid.

The question presented is whether the brief minute entry of the clerk shall be held to be of higher character, as evidence of the court's actual order in the premises, than the written order which was later signed by the judge. We think it should not be so held. A formal written order is signed by a judge, presumably after deliberation and mature reflection upon the matters involved. Such an entry, we think, should be accorded greater weight, and should be received as more solemn evidence of the court's real intention, than a mere minute entry which may be hastily made, and the true import of which may be overlooked by the judge.

In this instance it appears to the respondent judge that the clerk's minute entry more correctly records his decision than his own signed order, but another time the situation may be reversed. He may then find that the clerk's minutes are inaccurate, and that his own deliberately signed order correctly states his decision. If we

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should be thus driven from one to the other for evidence as to the actual order of the court, it is evident that frequent confusion might arise. It is therefore manifest that there should be some standard in the record, to which reference may be made as the conclusive evidence of what has been actually decided. We believe, when a written judgment or order has been signed by the court, it should be regarded as such standard. We think it a safe rule to hold that, when the court signs a written order, it shall be considered the evidence of its real and final act touching the subject immediately under consideration. Applying that rule here, the court's written order did not enjoin the relators from selling beer that was purchased by them prior to January 8, 1904, and which then remained unsold. The respondents should therefore not interfere with relators in making such sales, in view of the fact that the court's deliberately signed and recorded order in the premises does not so prevent them.

Respondents cite *Coyle v. Seattle Electric Company*, 31 Wash. 181, 71 Pac. 733, as supporting the contention that the journal entry should be held to be controlling. In that case the court avowedly sought, by a later entry, to correct what was supposed to be mere error of law inhering in a former one. It was held that errors of law cannot be reviewed in that manner, but must be corrected on appeal, and that the original journal entry therefore became the judgment of the court. No question arose in that case as to what the court actually intended. It was clear that the court simply intended to reverse its view of the law as embodied in the former entry. In the case at bar, however, the court undertakes to say, by its written judgment, what was actually decided, and it becomes a question whether that statement shall prevail over the clerk's minutes.

Respondents argue that the court may, by a *nunc pro tunc* order, correct the judgment entry and thus make it speak the truth, when by inadvertence or mistake it fails to state the actual judgment of the court. It is true it has been often held that the inherent power resides in the court to make such corrections in a proper case. 15 Enc. of Plead. & Prac., pp. 221 *et seq.*, and cases cited upon that subject. We do not understand that relators' counsel seriously dispute this principle. Such a record is, however, not before us now. Upon the contrary, the record shows that the Seattle Brewing & Malting Company applied to respondent Bell as judge to correct the judgment entry of January 12, 1904, on the ground that it did not speak the truth as to the court's actual decision. Said respondent, however, declined to make any correction, upon the theory, it seems, that the clerk's minute entry was the evidence of the actual decision and order of the court.

As the record comes before us, therefore, said respondent admittedly threatens to punish relators as for contempt, if they shall sell certain beer, the sale of which is in no way enjoined by the terms of the written and signed judgment of the court. For reasons already stated, the terms of that judgment must be held to import verity as to the court's decision as long as it remains unmodified and uncorrected.

It is ordered that the writ shall issue.

FULLERTON, C. J., and MOUNT, ANDERS, and DUNBAR, JJ., concur.

[No. 4694. Decided February 29, 1904.]

WALTER V. R. CROOKER, *Respondent*, v. PACIFIC LOUNGE
AND MATTRESS COMPANY, *Appellant*.¹

84	191
835	553
835	554
34	191
41	467

APPEAL—DISMISSAL—MOTION FOR NEW TRIAL. An appeal will not be dismissed for want of a motion for a new trial, where a paper filed and served was considered as such a motion without objection.

SAME—NECESSITY OF. A motion for a new trial is not necessary to secure a review of errors involved in the disposition of the case and fully presented below.

MASTER AND SERVANT—NEGLIGENCE—CUSTOM TO GUARD MACHINE—ADMISSIBILITY UNDER GENERAL ALLEGATION. Proof of a general custom to place guards upon ripaws is admissible under a general allegation of negligence in failing to provide a guard, after a promise so to do.

SAME—PROOF OF GENERAL CUSTOM TO ESTABLISH NEGLIGENCE. Proof of a general custom to guard a ripaw is admissible as tending to show whether appellant exercised reasonable care.

SAME—EVIDENCE IN REBUTTAL—CUSTOM TO CONTRADICT DEFENDANT'S EXPERTS. Where a plaintiff's expert witnesses had testified that spreaders were necessary adjuncts to hand-fed ripaws, and defendant's experts testified that they were antiquated devices and were being generally discarded, it is not error to permit testimony in rebuttal to the effect that, upon examination of the mills and factories at the place in question, spreaders were found to be generally used.

APPEAL—DECISION—LAW OF CASE—SAME EVIDENCE AS TO CONTRIBUTORY NEGLIGENCE. Upon the second appeal of a case, after substantially the same evidence, the decision on the first appeal that plaintiff was not guilty of contributory negligence becomes the law of the case, and is conclusive.

MASTER AND SERVANT—OPERATION OF RIPSAW—CUSTOMARY MANNER—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. In an action for personal injuries received while operating a ripaw, when it appears that the plaintiff was operating the machine in the customary manner, the question of his contributory negligence, in failing to remove a sliver so that it would not be caught by the saw, is for the jury.

¹Reported in 75 Pac. 632.

SAME—PROMISE TO REPAIR DEFECT—ASSUMPTION OF RISKS AFTER PROMISE—INSTRUCTIONS. Instructions that an operator of a machine does not assume the risk of a defect after a promise to repair, and as to his duty in the premises, approved.

SAME—AGE OF BOY OPERATING MACHINE—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS—PARTICULAR EVIDENCE. While the practice of trial courts in calling a jury's attention to particular evidence is not to be commended, it is not necessarily reversible error to state that the jury may consider the age and experience of a boy injured while operating a rip saw, upon the question of his contributory negligence.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered December 2, 1902, upon the verdict of a jury rendered in favor of the plaintiff for \$2,500 damages for the loss of an eye, sustained while operating a rip saw in defendant's factory, and caused by a stick thrown by the saw. Affirmed.

Reynolds & Griggs and *Stiles & Doolittle*, for appellant, contended, *inter alia*, that it was error to admit evidence of general custom as to the use of spreaders without any allegation in the pleadings making that an issue in the case. *Southwick v. First Nat. Bk.*, 84 N. Y. 420; *Knahtla v. Oregon etc. R. Co.*, 21 Or. 136, 27 Pac. 91; *Woodward v. Oregon R. & Nav. Co.*, 18 Or. 289, 22 Pac. 1076; *Wormsdorf v. Detroit City R. Co.*, 75 Mich. 472, 42 N. W. 1000, 13 Am. St. 453; *Chicago etc. R. Co. v. Young*, 26 Ill. App. 115; *Waldhier v. Hannibal etc. R. Co.*, 71 Mo. 514; *Ely v. St. Louis etc. R. Co.*, 77 Mo. 34; *Redford v. Spokane St. R. Co.*, 9 Wash. 55, 36 Pac. 1085. Whether there was negligence must be determined by the facts, and not by any general custom or practice. *Ilwaco etc. Nav. Co. v. Hedrick*, 1 Wash. 446, 25 Pac. 335, 22 Am. St. 169; *Bodie v. Charleston etc. R. Co.*, 61 S. C. 468, 39 S. E. 715; *Andrews v. Birmingham etc. R. Co.*, 99 Ala. 438, 12 So. 432; *Colf v. Chicago etc. R. Co.*, 87 Wis. 273, 58 N. W. 408; *Lewis v. Smith*, 107 Mass. 334.

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Opinion Per Curiam.

Govnor Teats, for respondent.

PER CURIAM.—This action was brought by plaintiff, Walter V. R. Crooker, a minor, by his father as guardian *ad litem*, against defendant, Pacific Lounge and Mattress Company, a corporation, to recover for personal injuries. The cause was before this court on a former appeal, and is reported in 29 Wash. 30, 69 Pac. 359. The plaintiff was nonsuited at the first trial in the superior court, and on his appeal to this court the judgment of nonsuit was reversed, and the cause was remanded for a new trial. When the case was subsequently called for trial on the 17th day of November, 1902, the superior court made an order discharging W. G. Crooker, as guardian *ad litem* for plaintiff, and directing that the cause proceed in the individual name of Walter V. R. Crooker as sole plaintiff. At the last trial, a verdict was rendered in favor of plaintiff for \$2,500. Judgment having been rendered on this verdict in favor of plaintiff, the defendant appeals.

The respondent moves to dismiss the appeal because appellant failed to serve and file a motion for a new trial. The record discloses that there was a paper served and filed in this action which was treated by the parties, and considered by the trial court on its merits, as a motion for a new trial, without any objections being interposed by respondent. Moreover, this court has decided that, where matters alleged as error were involved in the disposition of the case, and were fully presented to the court below, rulings had thereon, and exceptions taken, a motion for a new trial is unnecessary in order to obtain a review of such rulings on appeal. *Tullis v. Shannon*, 3 Wash. 716, 29 Pac. 449; *Dubcich v. Grand Lodge A. O. U. W.*, 33 Wash. 651, 74 Pac. 832. The motion to dismiss the appeal is therefore denied.

The plaintiff suffered the injuries of which he complains while in the employ of the defendant corporation and while operating a rip saw in its factory. The allegations in the pleadings of the respective parties to this controversy are fully stated in the former opinion. There has been no change in the issues since the cause was heard in this court on the former appeal. The testimony in plaintiff's behalf was of the same general character on the last trial as upon the first one, wherein the plaintiff was nonsuited in the superior court. The testimony in behalf of defendant company on this last trial was in direct conflict with plaintiff's evidence on all the material points in the controversy.

(1) In his complaint the respondent alleged:

"That he was injured through the negligence of the defendant in not placing the spreader or guard before the said saw, and thus protecting the saw from the splinters, sticks and boards from coming against it, and thus protecting the operator of the said saw and allowing the said saw to remain unguarded, by reason of which the said saw caught and threw the splinter which struck and injured the plaintiff; and that the said plaintiff was injured within such a time, after said defendant had promised to guard the said saw, as it would be reasonable to allow the said defendant to place on the said saw, the spreader or guard; and that the said plaintiff was not injured through any negligence on his part."

In the court below the appellant's counsel objected to the admission of evidence pertaining to the custom or usage of placing guards or spreaders on rip saws to prevent accidents happening to operators, such as is complained of in the case at bar, on the ground,

". . . that this case is based entirely upon a promise, and it does not make any difference whether this sort of appliance has ever been used by anybody else or not. The only question is whether it was stipulated for, and whether the promise was kept, and whether the injury was caused

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by the absence of this guard. There is only one point to which such testimony could go, and that would be to show what was the usual form of guard."

At subsequent stages of the trial, while respondent's witnesses were being examined in chief, appellant objected to the reception of testimony of this character on the grounds of its immateriality and irrelevancy. In this court it contends that the evidence was inadmissible on the grounds that it was not embraced within the pleadings and did not tend to establish negligence on its part.

But we think neither ground is tenable. It is not necessary to set out the negligent acts in detail, but a general averment that the defendant was negligent in doing or not doing the particular act complained of is sufficient. We so held in *Collett v. Northern Pacific R. Co.*, 23 Wash. 600, 63 Pac. 225. And in *Coates v. Burlington etc. R. Co.*, 62 Iowa 486, 17 N. W. 760, it was held that, when the negligence complained of was that defendant had failed to block a frog in its track, it was proper to allow plaintiff to prove, without averring it in his petition, a custom on the part of defendant to block all frogs along its line, for the purpose of showing an admission that frogs unprotected are dangerous to employees. See, also, *Kelly v. Southern Minn. R. Co.*, 28 Minn. 98, 9 N. W. 588; *Flanders v. Chicago etc. R. Co.*, 51 Minn. 197, 53 N. W. 544; 21 Am. & Eng. Enc. Law (2d ed.), 524.

As to the second objection, we think the proof complained of was relevant on the question whether the appellant had exercised reasonable care in not following a custom in guarding rip-saws; not that a compliance with the particular custom would necessarily exonerate, or non-compliance necessarily charge it with negligence; but its conduct in that regard was a material fact for the consideration of the jury, in connection with the other facts

and circumstances developed by the evidence in the case. See, *Bodie v. Charleston etc. R. Co.*, 61 S. C. 468, 39 S. E. 715, wherein the court observes: "It was for the jury to say whether such usual or customary method was such as a careful and prudent person should adopt under the circumstances."

(2) It is next urged that the trial court erred in admitting, over appellant's objections, the evidence of James Batcheler, a witness for respondent, called in rebuttal. Expert witnesses on behalf of respondent testified that spreaders were necessary adjuncts to hand-fed ripaws in order to prevent edgings and splinters from catching on the teeth of the saw and being thrown where they were liable to strike the operator. Witnesses of the same class on behalf of appellant testified that spreaders were antiquated devices on ripaws, impracticable, and augmented the danger to operators, and were being generally discarded. Respondent thereafter put Batcheler on the stand, who testified that about the last of June, 1901, he visited some of the mills and factories in Tacoma, and that out of the twenty-seven ripaws he examined he found twenty-four of them guarded. We think the trial court committed no error in admitting this evidence. It tended to show that spreaders were still in use and practicable, in contradiction of the testimony in appellant's behalf to the effect that such guards had been abandoned in the manufacturing establishments using hand-fed ripaws.

(3) Appellant complains that the trial court erred in not granting its motion for a nonsuit, on the ground that the evidence in respondent's behalf showed him to be guilty of contributory negligence. The theory of appellant's counsel is that the testimony showed that the sliver, which struck respondent and caused the injury, did not come from the back of the saw, but from the side, where the

spreader would have had no effect upon it; that it was carelessness on respondent's part to leave the sliver lying where it could be caught in the teeth of the saw while engaged in sawing the next cut. The respondent testified to the manner of his injury as follows:

"And I went down and started to work on the rip-saw and ripped a piece, and the saw was very dull and it didn't work very good, and I tried another saw and it was in the same condition, and I went to him [meaning Mr. Parker, the foreman] and told him it would not work, and I spoke to him about the saw not having a spreader on and asked him how it was that he hadn't put the spreader on, and he said he didn't have time, but was going to do it as soon as he got time; and he told me that he would file one of the saws, and for me to use the other one until he got that one done; and I went back and started to rip, and I ripped four or five pieces, and then the saw caught the edge that I ripped off, and threw it up and hit me in the eye and put my eye out."

Witness further testified, that the splinter which struck him was about ten inches long; that it laid between the saw and the gauge along side of the saw; and, while respondent was ripping another piece of board, instead of the splinter being pushed off the table, it got around behind the saw, catching in its teeth, which threw it forward; that, if there had been a guard on the saw at the time, it would not have been possible for the splinter to have got caught in that manner; that rip-sawyers depend upon the pieces which are being ripped off to clear the board, and there is no appliance for knocking these edgings away from the saw. On cross-examination, respondent testified, in response to questions put to him by appellant's attorney regarding this sliver, as follows:

"Q. Why didn't you push it out of the way? A. It wasn't the proper thing to do. Q. You knew that there was danger that things of that kind might get on the saw?

A. Yes, sir; there is danger of it, but there is more danger in putting your hands down in there and pushing it out."

There was also other testimony in respondent's behalf, tending to corroborate him, that a spreader on a rip-saw lessened the danger to the operator, and that it was unsafe to use such rip-saw without a guard. There was also some evidence on behalf of respondent to the effect that to allow these slivers and edgings to remain along side of the rapidly revolving saw without a guard was attended with more or less danger to the operator, unless such slivers and pieces were pushed off the table by the hand, or with a stick, before ripping the next cut.

The above matters were in the record before this court on the first appeal, and the question of contributory negligence was elaborately argued by the respective counsel, on both sides of the controversy, from the same standpoint as now presented here by appellant. It is true that in a former opinion the duty of the then respondent to have provided a guard or spreader for the saw, pursuant to the promise of its foreman, was the principal question discussed and considered by this court; still, evidence of the above character was properly in the record; and, as we reversed the decision of the trial court granting respondent's motion for a nonsuit, and remanded the case for a new trial, it seems to us that, under the well settled rule, this holding has become the law of the case, and we are bound by it on this appeal, even though it may not meet with our approval at this time. *Wilkes v. Davies*, 8 Wash. 112, 35 Pac. 611, 23 L. R. A. 103; *Furth v. Snell*, 13 Wash. 660, 43 Pac. 935; *Dodge v. Gaylord*, 53 Ind. 365; *Eversdon v. Mayhew*, 85 Cal. 1, 21 Pac. 431, 24 Pac. 382; note to *Hastings v. Foxworthy*, 34 L. R. A. 321.

But were it otherwise, we think the question was properly submitted to the determination of the jury. We ap-

preciate fully the force of the argument of appellant's counsel that where there are two ways of working about machinery, one absolutely safe and the other way attended with peril and danger, an employe who voluntarily chooses the perilous method rather than the safe one cannot recover for injuries thereby sustained; but whether, in the case at bar, the respondent did do this was a debatable question. The respondent testified, and in this he was supported by other evidence, that he was operating the rip saw in question in the customary manner when injured; and, this being so, the question of his negligence was one for the jury, and not for the court. It must be made to appear by evidence which leaves no room for dispute that the injured person was guilty of contributory negligence, before a court is warranted in taking that question from the jury.

(4) Appellant further contends that the trial court erred in giving certain instructions to the jury at the trial. The criticisms as to the 8th and 10th instructions have been heretofore considered and answered in this opinion in the discussion relating to the usage and custom in guarding rip saws. These instructions are consistent with the rules of law declared by this court on the former appeal, which have become the law of the case. The ninth instruction given by the trial court, of which appellant complains, is as follows:

"A general rule of law is that a person working with a defective or unguarded machine, and without complaint, and knowing of the dangers of the same, assumes the danger of the defect or unguarded part; but there is no longer any doubt that where an operator of machinery has expressly promised to repair a defect, the workman does not assume the risk of an injury caused thereby, within such a period or time after the promise as would be reasonably allowed for its performance; nor indeed, is any express promise or assurance from the master necessary. It is suf-

ficient that the workman may reasonably infer that the matter will be attended to.

"So you are instructed that if the plaintiff, at the time of his employment and at the time of the accident, saw the danger from the lack of the guard, and complained of the same to the foreman, and the foreman promised to put on a guard, and the plaintiff went to work and continued at work, on the promise, and you further find that the danger was not so imminent and immediate that a reasonably prudent man would not go to work or continue at work on the saw, and that at the time of the accident the plaintiff was relying upon the foreman's promise to place on a guard, then you are instructed that the plaintiff did not assume the risk and danger of an injury resulting from the lack of a guard."

This instruction is sustained by the principles of law announced in the former opinion and the authorities therein cited. To the same effect, see, further, *Johnson v. Anderson & Middleton Lumber Co.*, 31 Wash. 554, 72 Pac. 107; *Indianapolis & St. L. R. Co. v. Watson*, 114 Ind. 20, 14 N. E. 721, 15 N. E. 824, 5 Am. St. 578; *Erdman v. Illinois Steel Co.*, 95 Wis. 6, 69 N. W. 993.

The court also instructed the jury in the following language:

"The operator of a dangerous machine who has received from his employer a promise to supply a device calculated to lessen the danger, must, if he elects to operate the machine before the device is attached, operate his machine with due and proper care, considering its unprotected condition, in order that he may avoid injury. Therefore, it was the duty of the plaintiff while he was relying upon the promise to attach the spreader or guard, if such promise was made him, to handle the machine with reasonable care, in view of the fact that the spreader or guard had not been attached; and if he did not so handle it, he forfeited the promise and cannot now recover for his injury."

These principles of law are amply sustained by courts and elementary writers of the highest authority. See, *Indian-*

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apolis & St. L. R. Co. v. Watson, supra. The following instruction is also assigned as error by appellant:

"In considering the evidence on the question of contributory negligence, you may take into consideration the age of the plaintiff and his experience in the work he was at at the time of the accident, and whether or not he was an expert in the operation of rip-saws."

While the practice of trial courts in calling a jury's attention to particular items of evidence is not to be generally commended, we think that the superior court committed no prejudicial error in doing so in this instance.

(5) Error is assigned because the trial court refused to give certain instructions requested by the appellant. These we have examined in detail, and think all that is material in them was given in the general charge of the court.

There is no reversible error in the record, and the judgment is affirmed.

[No. 4793. Decided March 1, 1904.]

CLARA A. BENSON, *Respondent*, v. TOWN OF HAMILTON,
Appellant.¹

TRIAL—CONTINUANCE—DISCRETION—INTOXICATION OF WITNESS. It is not an abuse of discretion to refuse a continuance on the ground of the intoxication of a witness, where other witnesses had testified to the same facts which he was expected to swear to, and the adverse party admitted that he would so testify if sober, and where a continuance of one day had already been taken on that account.

NEW TRIAL—NEWLY DISCOVERED EVIDENCE—CUMULATIVE TESTIMONY. It is not error to refuse a new trial on account of newly discovered evidence as to statements made by the plaintiff that she was not injured in the manner claimed, when it was only cumulative, other witnesses having testified to similar statements made to them, and this being one of the main points in the case.

¹Reported in 75 Pac. 805.

MUNICIPAL CORPORATIONS—STREETS—NEGLIGENCE—UNCORROBORATED EVIDENCE—SUFFICIENCY. In an action for personal injuries sustained in a fall upon a defective walk, the uncorroborated testimony of the plaintiff as to the condition of the walk is sufficient to make a prima facie case for the jury, and the credibility thereof is exclusively for the jury.

SAME—PLAINTIFF'S KNOWLEDGE OF DEFECT—CONTRIBUTORY NEGLIGENCE—WHEN FOR JURY. The statement of plaintiff, injured by a fall on a defective walk, that the walk was old, that she had been over it many times and had seen defects in it, is competent but not conclusive evidence of contributory negligence, making it a question for the jury.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered February 9, 1903, upon the verdict of a jury rendered in favor of the plaintiff for personal injuries sustained through a defect in the sidewalk. Affirmed.

Smith & Brawley and Shrauger & Barker, for appellant.

Million & Houser, for respondent.

MOUNT, J.—Respondent was injured by a fall on a defective sidewalk in the town of Hamilton. She recovered a judgment in the court below. The town prosecutes this appeal, alleging error of the trial court upon the following grounds: (1) in denying appellant's application for a continuance of the trial on account of the drunken condition of a witness; (2) in denying a motion for a new trial on the ground of newly discovered evidence, and upon the ground of the insufficiency of the evidence to justify the verdict.

(1) At the trial appellant called a witness by the name of W. H. Rugg. This witness, after being subpoenaed on the part of the appellant, became so intoxicated that, when called to the witness stand, the court excluded him therefrom and refused to permit him to testify in the case, and

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also inflicted punishment for contempt upon him. Thereupon appellant made an application to the court for a continuance of the trial until the witness could become competent to testify in the case, stating the facts to which the witness would swear when in condition to give evidence in the cause. Respondent thereupon admitted that the witness would testify to the facts stated, and the court denied the application.

The statute provides that a person intoxicated at the time he is called for examination is incompetent to testify in a cause. Bal. Code, § 5993. A continuance of the trial of a case rests largely in the sound discretion of the court, and is subject to review only for abuse of such discretion. There is nothing in the record before us indicating that the appellant was in any wise to blame for the condition of the witness, or that it knew of any predisposition of the witness to become intoxicated. There is no showing as to the length of time required for the witness to become competent. It does appear, however, that the trial of the cause was continued from one day until the next in order to obtain the attendance of this witness. It also appears that one other witness had testified in the case to the same facts that this witness was expected to swear to, and the counsel for respondent promptly admitted that the witness, if sober, would testify to the facts as stated by appellant. It was said in *Fox v. Territory*, 2 Wash. Ter. 297, 5 Pac. 603:

“The exclusion of the intoxicated witness was not error, but it might have constituted strong ground for a new trial, if the defendant, upon the exclusion of the witness, had informed the court of the importance to the defense of his testimony, and had asked an adjournment of the cause until he became competent to testify, and the court had refused the request.”

In this case the court was informed of the importance of the testimony of the witness, but the respondent admitted that the witness would testify to all the facts stated. This admission was sufficient under the statute, § 4977, Bal. Code, to justify the court in refusing the continuance, and such refusal was therefore not error.

(2) After verdict in favor of respondent, appellant filed a motion for a new trial upon the ground of newly discovered evidence, and this motion was denied. The newly discovered evidence was that of another witness, a Mrs. Rupe, who, in her affidavit in support of the motion, stated that the appellant told her shortly after her injury that she received the injury complained of by a fall upon her own door step, and not by a fall upon the street of the appellant city. This issue was the principal one in the trial. Appellant had one witness upon the trial who testified that respondent told her the same thing, and it was also admitted at the trial that the witness Rugg, hereinbefore referred to, would, if sober, testify to a similar statement made to him. So that it clearly appears that this evidence is cumulative, and for that reason the court below did not abuse its discretion in denying a motion upon this ground.

Appellant contends that the evidence was insufficient to justify the verdict, because the plaintiff was not corroborated as to the place upon the sidewalk where she was injured, and because she was guilty of contributory negligence in going upon the sidewalk. The plaintiff herself was the only witness who testified as to the place where she was injured, and no one was with her, or saw her fall and receive her injuries. No corroboration was necessary in order that the jury might consider her testimony. The credibility of the witness was exclusively for the jury. Respondent testified that the sidewalk upon which she was

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injured was an old sidewalk and that she had been over it many times before and had seen defects in it. These facts were competent to go to the jury upon the question of contributory negligence, but are not conclusive thereof. *McQuillan v. Seattle*, 10 Wash. 464, 38 Pac. 1119, 45 Am. St. 799; *Smith v. Spokane*, 16 Wash. 403, 47 Pac. 888; *Rowe v. Ballard*, 19 Wash. 1, 52 Pac. 321; *Cowie v. Seattle*, 22 Wash. 659, 62 Pac. 121; *Jordan v. Seattle*, 26 Wash. 61, 66 Pac. 114; *Mischke v. Seattle*, 26 Wash. 616, 67 Pac. 357; *Christianson v. Pacific Bridge Co.*, 27 Wash. 582, 68 Pac. 191. The evidence not being conclusive of contributory negligence, the trial court properly submitted that question to the jury. The motion was properly overruled.

There is no error in the record, and the judgment is therefore affirmed.

FULLERTON, C. J., and HADLEY, ANDERS, and DUNBAR, JJ., concur.

[No. 4761½. Decided March 1, 1904.]

J. A. DUNHAM *et al.*, Respondents, v. CITIZENS' INSURANCE Co., Appellant, and J. W. POWELL, Defendant.¹

INSURANCE—VALIDITY—FRAUD—FALSE REPRESENTATIONS IN SECURING POLICY—INTENT. A policy of fire insurance upon a house in the course of construction is void where the owner secured the same by falsely representing to the agent the value of the house when completed and that he had already paid \$1,500 on the contract price, when he had in fact paid less than \$700, and such statement peculiarly within his knowledge must be presumed to have been intentionally made and fraudulent.

SAME—REPRESENTATIONS OUTSIDE THE WRITTEN APPLICATION. Such false representations vitiate the policy although not in-

¹Reported in 75 Pac. 804.

cluded in the written application, when fraudulently made upon inquiry by the agent, where the policy provides that it shall be void if the insured has concealed or misrepresented "in writing or otherwise" any material fact.

SAME—FALSE REPRESENTATIONS TO AGENT NOT COMMUNICATED TO THE COMPANY. False representations as to matters material to a risk, made to an agent who had power to and did issue the policy without sending the application to the company, vitiate the policy, although they were not communicated to the company, the information relied upon by the agent being under the circumstances information to the company.

SAME—POSITION OF CREDITORS FOR WHOSE BENEFIT INSURANCE IS FRAUDULENTLY SECURED—DEFENSE OF FRAUD. Where the owner of a house secures insurance in his own name by fraudulent representations without disclosing that it was secured for the benefit of creditors who had furnished material for its construction, the creditors stand in no better position than the owner, and the defense of fraud is available to the company.

SAME—COMPROMISE OF VOID POLICY—EQUITABLE ASSIGNMENT OF CLAIM—DEFENSE OF FRAUD. Where an insurance company compromises a loss under a void policy by paying the owner of the premises one-half the sum claimed, without notice to creditors of the owner who had given notice of an equitable assignment to them of the amount due on the policy, the company is not liable to such creditors, since nothing was due on the policy, and the invalidity of the policy could still be litigated by the company to defeat its recovery.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered March 17, 1903, after a trial on the merits before the court without a jury, awarding plaintiffs the amount claimed under an equitable assignment of a loss on a fire insurance policy. Reversed.

Sharpstein & Sharpstein, for appellant.

W. T. Dovell, for respondent.

MOUNT, J.—On the 11th day of April, 1902, the defendant J. W. Powell entered into a contract with L. D. Pettit and wife to purchase a lot in the city of Walla Walla. The purchase price was \$2,000, \$200 of which was paid down,

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and the balance was to be paid in monthly installments of \$15 each, beginning on December 1st of that year. A deed was executed by Pettit and wife, and placed in escrow to be delivered to Powell when the balance of the \$2,000 was finally paid. Powell took immediate possession of the lot, and thereupon entered into a contract with one Fields, by which contract Fields agreed to furnish the material and erect a dwelling house upon the said lot for the sum of \$1,650. While the house was being constructed, respondents and their assignors, at the request of Fields, furnished materials and labor to the value of \$1,039.40, for the construction of the building. After the materials and labor had been furnished, respondents demanded payment of Powell, or security therefor, and Powell promised to obtain insurance upon the house, which he said should secure all the creditors.

Immediately thereafter, and on July 16, 1902, Powell applied to the agent of appellant for a policy of insurance upon the said building, for the sum of \$1,800, without informing the agent that the policy was for the benefit of any one but himself. The agent thereupon inquired of Powell the value of the house, and was informed by Powell that the house was worth \$1,800, and would cost when finished \$2,200, and that he had already paid \$1,500 thereon; when, as a matter of fact, he had paid less than \$700. Powell thereupon signed a written application for the policy of insurance to be issued in his own name, which application made no reference to the value of the property, but did contain questions relating to the title, which were answered as follows:

"Q. What is your title to the ground? A. Deed. Q. Is property mortgaged? A. No."

The agent thereupon, on the same day, relying upon the statements and the written application, issued the policy

as applied for, and delivered it to Powell. Four days later, viz., on July 20, the building was destroyed by fire. It was then worth \$1,800. Thereafter, upon the refusal of Powell to assign the policy to respondents, they and their assignors served notice on the insurance company, claiming a lien upon, and an equitable assignment of, the proceeds of the policy for the amount of their respective claims. After receiving these notices of claims by respondents, and when Powell made a claim for loss under the policy, the insurance company questioned the validity of the policy, because of misrepresentations made by Powell both as to his title and as to his interest in the property, and also as to the amount he had paid on the contract for the construction of the building. Subsequently Powell and the insurance company agreed upon a compromise, and the insurance company paid Powell \$700 in full settlement, disregarding the claims of respondents. Powell thereupon left the country.

Respondents brought this action against Powell and the insurance company to recover the amount of their claims, alleging an equitable assignment of the amount due on the policy of insurance. Powell made no appearance. The insurance company defended upon several grounds, one of which was that the policy was void because of misrepresentations made by Powell to the agent as to the amount Powell had paid for the construction of the building insured. Upon a trial before the court without a jury, a judgment was entered against the insurance company for the amount of the claim. This appeal is prosecuted from that judgment.

A number of errors are assigned and argued, but upon the undisputed facts, as we view them, the cause must be reversed because of the invalidity of the policy. The evidence shows conclusively—in fact there is no dispute—

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that, at the time Powell applied for the policy, and before it was issued to him, he stated to the agent that the house when completed would be worth \$2,200, and at that time he had paid thereon \$1,500, when as a matter of fact he had paid less than \$700, and afterwards paid no more. This was a material fact for the company to know. The information was sought by the agent in order to determine the amount of the risk. The false statement was, no doubt, made in order to induce the insurance company to take the risk for a much larger sum than it would have done had the truth been known. The statement, while not a warranty, was clearly material and fraudulent, and therefore vitiated the policy. 2 Joyce, Insurance, § 1896, and authorities there cited; 2 May, Insurance (4th ed.), § 373; 1 Wood, Insurance (2d ed.), p. 562, *et seq.*

In order to avoid the effect of this representation, respondents argue that it does not appear that the statements were intentionally made, and that they were not included in the written application, and were not communicated to the home office; and therefore the company did not rely thereon when it issued the policy. This argument cannot avail the respondents. The evidence is conclusive that, in answer to the inquiry of the agent as to the value of the property, Powell stated that he had paid \$1,500 on the contract price of the building, when in fact he had paid less than \$700. This fact was peculiarly within the knowledge of Powell. He knew it was false, and must be presumed to have made the statement intentionally.

It is true that there was no question in the written application as to the value of the property, but this was a material fact which the company was entitled to know in order to determine the risk which it was requested to assume. The agent inquired for the fact when he received the application for the policy. He was wrongly and fraud-

ulently informed. There is a provision in the policy as follows: "This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof." This provision clearly contemplates other information than the information contained in the written application.

The agent relied upon the information, and immediately issued and delivered the policy. It was not necessary for the agent to send the application to the home office. He was authorized to issue the policy himself, and did so, and immediately delivered it to Powell. The information which the agent relied upon must, under these circumstances, be held to be information which the appellant company relied upon. Powell certainly could not have recovered upon the policy in the face of his fraud; and even if he obtained the policy for the use and benefit of respondents, they are in no better position than Powell.

It is true the company had notice before it settled with Powell that respondents claimed an interest in the money due on the policy; but, if the policy was void, there was nothing due, and a compromise thereof did not render the insurance company liable to any person upon the policy. The validity thereof, unaffected by the compromise, might still be litigated as between the insurance company and any other person interested. The insurance company, in fairness to the respondents, might have notified them of the settlement about to be made with Powell, but no legal liability was incurred merely by a failure to do so.

For the reason that the policy was void because of the false representations named, the cause is reversed, and the lower court is directed to dismiss the action.

FULLERTON, C. J., and HADLEY, ANDERS, and DUNBAR, JJ., concur.

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[No. 4806. Decided March 1, 1904.]

PETER CHANTLER, *Appellant*, v. EDWARD HUBBELL,
Respondent.¹

TRUSTS—FRAUD—BLIND MORTGAGE IN FRAUD OF CREDITORS—ACCOUNTING BY FRAUDULENT MORTGAGEE AS TRUSTEE—AID REFUSED TO EITHER PARTY. Where a "blind" mortgage was given to protect the property from execution upon an anticipated judgment against the owner, and the property is nevertheless sold on execution and the judgment creditor becomes the purchaser, and afterwards sells the land for a small sum to the holder of such mortgage, the owner is not entitled in equity to an accounting from such mortgagee as a trustee, since the transaction was a fraud which the courts should discourage by refusing aid to either party.

APPEAL—FINDINGS ON CONFLICTING EVIDENCE—REVIEW. Findings in an equity case should not be disturbed where but two witnesses testify and their evidence is conflicting and the lower court had an opportunity to observe their appearance and conduct on the witness stand.

Appeal from a judgment of the superior court for Clarke county, A. L. Miller, J., entered March 13, 1903, after a trial before the court without a jury, dismissing on the merits an action to declare a trust and for an accounting. Affirmed.

George W. Joseph (*N. H. Bloomfield*, of counsel), for appellant.

E. M. Green, for respondent.

FULLERTON, C. J.—In 1890 the appellant Chantler, being then the owner of certain real property situate in the city of Vancouver, Clarke county, mortgaged the same to a loan company to secure a loan of \$800, and shortly thereafter conveyed the fee of the property, subject to the mortgage, to one Bud Van Atta. Later on, and prior to July

¹Reported in 75 Pac. 802.

5th, 1894, he became the owner of two other tracts of land situate in the same county; and on that date he gave a mortgage on the same to the respondent Hubbell, purporting to secure a loan of \$800 made to him by respondent, payable, according to the terms of the mortgage, on or before five years after date.

Subsequent to the execution of this latter mortgage, the loan company brought foreclosure on the first one, prosecuted the same to judgment and sale, and obtained a deficiency judgment against Chantler for some \$391. Execution was issued on this judgment, and the property mortgaged to respondent was levied upon and sold in satisfaction thereof, the loan company becoming the purchaser of the property for the full amount of the deficiency judgment. Later on the respondent purchased the land from the loan company, paying therefor \$50 and the back taxes on the land, amounting in the aggregate to about \$100, taking a quitclaim deed to the property.

In this action the appellant sought to have the respondent declared a trustee holding the property in trust for him, subject to be conveyed on his paying to the respondent the amount the respondent had advanced in procuring the legal title to the property and in the payment of taxes thereon. He asked further that these amounts be determined, and that the respondent be required to reconvey the property to him, on his paying the amounts so determined to the respondent, or into the court for his use. The trial court, after hearing the evidence of both sides, entered a judgment dismissing the action for want of equity, taxing the costs against the appellant. This appeal is from that judgment.

In his complaint the appellant alleges, in substance, that prior to the execution of the mortgage to the respondent he learned that the loan company contemplated foreclosing the mortgage he had theretofore given on the land conveyed to

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Van Atta, and that he anticipated a deficiency judgment against himself as a result of such foreclosure; that, to procure a means of satisfying such deficiency judgment, and protecting his real property from the sacrifice of a forced sale, he entered into a contract with the respondent, by the terms of which the respondent agreed that, in consideration of the execution of the above mentioned mortgage, he would satisfy such deficiency judgment and protect the appellant's property from sale thereunder, and treat such sums of money necessarily advanced for that purpose as secured by such mortgage, and that the mortgage was thereafter executed in pursuance of such understanding and agreement.

His testimony given on the witness stand was not quite so specific. He stated, when being interrogated directly by his counsel, that the mortgage was given for purposes substantially as alleged in his complaint, but when he undertook to detail the transaction, and in his cross-examination, he testified, that prior to the execution of the mortgage nothing was said about the advancement of money thereunder; that the mortgage was first intended as a "blind mortgage," to protect his property from sale under the deficiency judgment, should one be obtained against him; and that the agreement on the part of the respondent to satisfy and pay off the deficiency judgment was made after the execution of the mortgage.

On the other side the respondent testified, that there was no agreement made, either before or after the execution of the mortgage, to the effect that he was to make advancements for the purposes stated, or advancements for any purposes on behalf of the appellant; that the appellant sought him out, and asked to be allowed to execute the mortgage to him, stating that the property was liable to be sold on a judgment which was certain to be obtained against him, and that he thought such a mortgage would "scare

away" the judgment creditor. He further testified that he consented to hold the mortgage, after being advised that it would not "get him into trouble," and with the understanding that, if any question arose concerning it, he would tell the truth about it. He also testified that he purchased the property after informing the mortgage company that the mortgage he held was sham and without consideration, and after the company had given the appellant the opportunity to purchase the property at the same price. This latter statement, however, the appellant denied. No other witness testified concerning the transaction.

Whether or not the respondent took the title to the property charged with a trust in favor of the appellant depends, it seems to us, upon the effect that is given to this testimony. If it be the fact that the mortgage to the respondent was given on the express understanding that he would, in consideration thereof, protect the title of the appellant against any deficiency judgment obtained on the mortgage to the loan company, then he is obligated to reconvey the title he did acquire to the appellant on the repayment to him, with interest, of the sums he has advanced for that purpose; and it may be that the same result would follow were it true that the mortgage was first conceived in fraud, and the parties afterwards repented and agreed to make an honest transaction out of it. But if it be a fact that the mortgage was fraudulent in its inception, and remained such throughout, then no rights can grow out of it which a court of justice will enforce.

While there are certain admitted exceptions to the general rule that courts will refuse to aid either party to a fraudulent transaction, this case does not fall within them. The courts refuse to aid in fraudulent transactions, because of public policy, and the rule operates, of course, only in cases where the refusal of the courts to aid either party

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frustrates the object of the transaction, and takes away the temptation to enter into them—that is to say, when it tends to promote good morals not to aid either party, aid is refused by the courts; but whenever public policy is considered advanced by giving relief to either party, then such relief will be given.

Cases, however, where public policy will be best subserved by aiding or enforcing a fraudulent transaction are very rare, and instances where the rule has been put in force are not many; but a frequently cited instance is found in the case of *Montefiori v. Montefiori*, 1 W. Bl. 363, where one brother gave to another a note in order to enable the latter to make a wealthy marriage. This note was enforced because such contracts would best be discouraged by enforcing them. But it is evident that the case at bar does not fall within any such rule. If the mortgage is to be held free of fraud, then there is no question of public policy involved. If, on the other hand, it was intended to defraud the appellant's creditors, the appellant cannot, by any proceeding in the courts, compel the respondent to share with him, or turn over to him, the profit the respondent may have made by reason of the fraud. Such a rule would encourage, not discourage, fraudulent transactions.

On the question of fact, we are not disposed to overrule the findings and conclusions of the trial court. As we have said, there were but two witnesses to the main transaction, the appellant and the respondent, and their evidence was squarely in conflict. As the trial court had the opportunity to observe the appearance, conduct, and demeanor of the witnesses while testifying, its conclusion is much more apt to be the right one than is the conclusion of this court, which must make up its findings from the transcript. The findings of the trial court require an affirmance of the

judgment, and the order of this court will be that the judgment stand affirmed.

HADLEY, ANDERS, MOUNT, and DUNBAR, JJ., concur.

[No. 4781. Decided March 1, 1904.]

OUDIN & BERGMAN FIRE CLAY MINING AND MANUFACTURING COMPANY, *Respondent*, v. THOMAS F. CONLAN
et al., *Appellants*.¹

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CORPORATIONS—STOCK—TRUSTEE—DISPOSAL OF STOCK HELD BY. A trustee of a corporation, by a sale of all his stock therein, *ipso facto* ceases to be a trustee, in view of Bal. Code, § 4255, requiring trustees to be stockholders.

SAME—CONTROL OF PROPERTY—STOCKHOLDER'S RIGHT AS AGAINST OFFICERS. A mere stockholder in a corporation has no right to the possession or control of the property as against a trustee who is also an officer.

APPEAL — DISMISSAL — ADMISSION OF APPELLANT — NO CONTROVERSY EXISTING. In an action to enjoin a former trustee and stockholder of a corporation from exercising control over the affairs of the corporation, in which a temporary injunction is granted, an appeal by defendant claiming to be a trustee, will be dismissed on motion on the ground that no controversy exists, where the answer admits that said trustee had sold all of his stock in the corporation, and it is not denied that he had shortly before testified that he was no longer a stockholder and had severed his connection with the corporation.

Appeal from an order of the superior court for Spokane county, Kennan, J., entered April 27, 1903, granting a temporary injunction against interference with the affairs of a corporation. Dismissed.

Danson & Huneke and *R. L. Edmiston*, for appellants.
Thayer & Belt, for respondent.

¹Reported in 75 Pac. 802.

PER CURIAM.—Respondent moves to dismiss this appeal on the ground that the controversy between the parties has ceased, as far as matters involved in this appeal are concerned. The suit was brought by the respondent corporation against the appellants to procure an injunction against appellants, preventing them from interfering with respondent's business, from exercising, or assuming to exercise, any control over the affairs of the corporation, or authority over the workmen engaged at respondent's place of business, and from selling, or offering to sell, any of the property of the corporation. It is alleged that, until the 22d day of April, 1903, the entire stock of the corporation was owned as follows: Charles P. Oudin, 1 share; Eva M. Oudin, 749 shares; Thomas F. Conlan, 375 shares; and Martin L. Bergman, 375 shares; that on said 22d day of April said Bergman transferred to said Conlan all of the stock theretofore owned by Bergman; that, until the time of said transfer, said Charles P. Oudin and said Bergman constituted the board of trustees of said corporation, and that said Charles P. Oudin was president and treasurer, and said Bergman was vice-president and secretary of the said board. It is further alleged, that on April 21, 1903, said Bergman resigned his office as vice-president and secretary, and notified the president, who was also the remaining trustee, to that effect; that on the 23d day of April respondent, through its said president, notified said Bergman, who had theretofore been working at the pottery of respondent, that, having severed his connection with respondent, he must forthwith leave the premises of the company and cease to have anything to do with its business; that said Bergman thereupon surrendered peaceable possession of the company's property to said Oudin as the sole representative of the company, and withdrew from the premises, peaceably and without resistance or protest of any kind; that

after said Bergman had peaceably withdrawn, and within a few hours thereafter, he returned to the pottery of respondent with said Conlan; that said Conlan had at no time been either an officer or trustee of respondent, or in any way connected with said corporation, except as a stockholder therein; that said Bergman and Conlan thereupon entered upon respondent's premises, and assumed to assert exclusive control and authority over the premises and property there located, and said Conlan entered in the books of the company a statement to the effect that he thereupon took charge; that since said time said Bergman and Conlan have gone upon the premises of the respondent, and, without right or authority, have assumed to represent respondent, and, against the wishes and without the consent of respondent, have sold and delivered its goods, have exercised control over its workmen, have collected money due to it, have countermanded orders given to the workmen by said Oudin, have disputed the authority of respondent's officers over its workmen, and have induced the workmen to violate such orders; that said acts have been continued since the date above mentioned, are now continuing, and will be indefinitely continued unless restrained. The answer admits the sale and transfer of Bergman's stock to Conlan, but it is claimed that he is still a trustee of the corporation, and that he employed Conlan to assist in the management of the business. A temporary injunction was granted, and the appeal is from the order granting such injunction.

In support of the motion to dismiss, respondent submits the following affidavit:

"Charles P. Oudin, being first duly sworn, on oath deposes and says: I am the president of said respondent, Oudin and Bergman Fire Clay Mining and Manufacturing Company, and make this affidavit upon its behalf, and state that Martin L. Bergman has severed his connection with respondent, and has so admitted in open court under

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oath, and, on August 12th, 1903, in a case then pending in the superior court of Spokane county, state of Washington, said Bergman being examined in regard to his connection with respondent, testified as follows:

"Q. Do you still claim to be a trustee of this company? A. I have never resigned. Q. Do you still claim to be a trustee? A. No, I do not. Q. How much did Mr. Conlan pay you for the quarter interest? Objected to as immaterial. Objection sustained. Q. How much did he pay you for the half interest? Same objection. Objection sustained. Exception. Q. Do you still own any stock in this company? A. No, sir. Q. Have you got any agreement by which you could get stock from Mr. Conlan? A. No, sir. Q. You are absolutely out of it? A. Absolutely out of it. Q. Ceased your connection with the company? A. Except my resignation as secretary and manager. Q. Do you claim to be manager yet? A. No; I do not claim it, but my resignation has not gone in that I know of. Q. You have severed your connection with the company? A. Yes, sir."

In response to the above affidavit, and in resistance of the motion to dismiss, appellants submit the following affidavit:

"Martin L. Bergman, being first duly sworn, on oath deposes and says: that he has never resigned nor tendered his resignation as secretary, vice-president and manager of the Loudin & Bergman Fire Clay, Mining & Manufacturing Company; that he has at all times claimed to be such secretary, vice-president and manager and now claims to be such; that when affiant testified on August 12, 1903, as set forth in the affidavit of Charles P. Loudin, all that he intended to say was that he had sold all his stock in said company and was not a stockholder, but that he was still an officer of said company, as above stated; that affiant has been advised by his attorneys that he has at all times been and now is a trustee of said corporation, and claims to be such trustee, and as stated by affiant in said testimony, affiant has never resigned or tendered his resignation as trustee of said company."

It will be observed that Bergman in his affidavit does not deny that he testified as stated in Oudin's affidavit. It is therefore a conceded fact, both in his affidavit and in the answer, that Bergman is not a stockholder in the corporation. He says, however, that he still claims to be a trustee. Not being a stockholder he is no longer a trustee. Our statute, § 4255, Bal. Code, requires that trustees of a corporation shall be stockholders therein.

"Where the charter requires the director to be a stockholder he must continue to hold stock during his term of office. If he sells all his stock in the company he thereby becomes disqualified and ceases *ipso facto* to be a director." 1 Cook, Stock and Stockholders, etc. (3d ed.), § 623.

Again, in Clark & Marshall on Private Corporations, the discussion of this subject in § 661 is concluded as follows:

"According to the better opinion, when the ownership of stock is necessary to qualify one as a director, a person ceases to be a director if he ceases to be a stockholder, without any proceedings to remove him, although he may have owned stock when elected."

Again, in Mr. Thompson's recently prepared and exhaustive treatise of the Law of Corporations, as found in 10 Cyc., the following statement appears at page 738 of said volume:

"Where the statute requires that the members of the board must be holders of at least a given number of shares, a director who assigns all his shares to another, *ipso facto* divests himself of his title to the office, . . ."

The following cases are also in point on this subject: *Chemical National Bank v. Colwell*, 132 N. Y. 250, 30 N. E. 644; *Sinclair v. Dwight*, 9 App. Div. 297, 41 N. Y. Supp. 193; *Orr Water Ditch Co. v. Reno Water Co.*, 17 Nev. 166, 30 Pac. 695.

Within the above authorities Bergman has ceased to be a trustee and is not therefore entitled to exercise any control

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over respondent's property. Conlan, being a mere stockholder, has not the right to possession and control of the property of the company, as against a regularly qualified trustee, who is also the president of the company. At the time of the hearing below, Bergman also claimed to be manager of the company, but his testimony, set forth in Oudin's affidavit above, shows that subsequent to said hearing he said he did not claim to be manager. True, he said he had not resigned, but he unqualifiedly answered that he had severed his connection with the company. It is admitted that that testimony was solemnly given under oath. The examination was so direct and simple that its import could not well have been misunderstood. Since he is neither stockholder nor trustee, his connection with the company is in law effectually severed, and that fact, taken together with his own statement under oath, we think establishes that he no longer possesses any power to control the affairs of the corporation. There is, therefore, no controversy here to be determined on this appeal. In such a case it was held in *Hice v. Orr*, 16 Wash. 163, 47 Pac. 424, that the appeal should be dismissed.

The motion here is therefore granted, and the appeal is dismissed.

[No. 4916. Decided March 3, 1904.]

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THE STATE OF WASHINGTON, *Respondent*, v. JOHN GLINDEMANN, *Appellant*.¹

INCEST—KNOWLEDGE OF RELATIONSHIP—CONSTITUTIONAL LAW—DUE PROCESS—INFORMATION SUFFICIENT WITHOUT CHARGING SCIENTER. Bal. Code, §§ 7228, 7229, defining the crime of incest without including actual knowledge on the part of the defendant of his relationship to the *particeps criminis*, does not violate the

¹Reported in 75 Pac. 800.

fourteenth amendment as an attempt to deprive one of liberty without due process of law; and an information thereunder is sufficient without alleging *scienter*.

INCEST—DEFENSE OF INSANITY—EVIDENCE—RECORD OF GUARDIANSHIP—EXCLUSION OF CUMULATIVE TESTIMONY. Upon the defense of insanity the exclusion of the record of the appointment of a guardian for the defendant as of unsound mind is not prejudicial error, where the record of the actual adjudication of insanity preceding the appointment was admitted, since it could have been no more than cumulative evidence.

SAME—WIFE'S APPOINTMENT AS GUARDIAN—COMPETENCY. Such record, showing that defendant's wife was still his guardian, is not admissible to show that she, who instigated the prosecution, was in duty bound to look after his defense, since her attitude can be better shown by other evidence.

TRIAL—INSTRUCTIONS—COMMENT ON EVIDENCE. It is unlawful comment on the evidence and reversible error for the court, upon a dispute as to what a witness had testified to upon a material point in the case, to declare in the presence of the jury what such evidence was, and to state that the stenographer's report thereof is wrong, and no distinction can be made because the remarks were not addressed to the jury.

Appeal from a judgment of the superior court for Spokane county, Richardson, J., entered June 22, 1903, upon a trial and conviction of the crime of incest. *Reversed.*

P. C. Shine and Townsend & Moore (W. F. Townsend, of counsel), for appellant.

Horace Kimball and Miles Poindexter, for respondent, to the point that the remarks of the trial judge were not unlawful comment on the evidence, cited: People v. Mayes, 113 Cal. 618, 45 Pac. 860; State v. Surry, 23 Wash. 655, 63 Pac. 557; State v. Burton, 27 Wash. 528, 67 Pac. 1097; People v. Abbott, 101 Cal. 645, 36 Pac. 129; Mounts v. Goranson, 29 Wash. 261, 69 Pac. 740; McElroy v. Williams, 14 Wash. 627, 45 Pac. 306; Price v. Scott, 13 Wash. 574, 43 Pac. 634; Drumheller v. American Surety Co., 30 Wash. 530, 71 Pac. 25; Nunn v. Jordan, 31 Wash. 506, 72 Pac. 124; Myrberg v. Baltimore etc.

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Red. Co., 25 Wash. 364, 65 Pac. 539; *People v. Benc*, 130 Cal. 333, 62 Pac. 404; *People v. Phelan*, 123 Cal. 551, 56 Pac. 424; *Blue v. McCabe*, 5 Wash. 125, 31 Pac. 431; *People v. McLean*, 84 Cal. 480, 24 Pac. 32; *Cogdell v. State* (Tex.), 74 S. W. 311; *State v. May*, 172 Mo. 630, 72 S. W. 918; *Newman v. State* (Tex.), 64 S. W. 258; *State v. Thompson*, 155 Mo. 300, 55 S. W. 1013; *State v. Walker*, 50 La. An. 420, 23 South. 967; *Bannen v. State*, 115 Wis. 317, 91 N. W. 107, 965; *Gaines v. State* (Tex.), 47 S. W. 1012; *United States v. Peay*, 5 Utah 263, 14 Pac. 342.

HADLEY, J.—Appellant was charged with the crime of incest committed with his own daughter. Having been tried and convicted, he has appealed to this court. He first assigns as error that the court overruled his demurrer to the information. The essential part of the information is as follows:

“That the said defendant John Glindeman, in the county of Spokane and state of Washington, on or about the 1st day of January, 1902, did wilfully, unlawfully and feloniously have sexual commerce with and carnally know one Marie Glindeman, the said Marie Glindeman then and there being a female and a daughter of said John Glindeman, thereby committing the crime of incest.”

Incest is defined in §§ 7228, 7229, Bal. Code, as follows:

“Incest is the sexual commerce of persons related within the degrees wherein marriage is prohibited.”

“Persons being within the degrees of consanguinity or affinity, within which marriages are prohibited by law, who intermarry with each other, or who commit fornication or adultery with each other, or who carnally know each other, shall be deemed guilty of the crime of incest, . . .”

It is urged that actual knowledge, on the part of the accused, that the relationship is within the said degrees of consanguinity is necessary in order to constitute the crime.

It is insisted that the criminal intent cannot exist without actual knowledge of the relationship. Appellant contends that the statute defining incest should include the element of knowledge on the part of an accused, and that its failure so to do is in violation of the fourteenth amendment to the constitution of the United States, as an attempt to deprive one of liberty without due process of law. But if the statute itself shall not, for that reason, be held to be violative of the constitutional principle, it is urged that, in any event, the information must go farther than the statute, and include the element of knowledge in its charging part, before it can be held that it charges a crime. Appellant cites *State v. McGilvery*, 20 Wash. 240, 55 Pac. 115, as supporting the view that the information charging one with the crime of incest must charge knowledge of the relationship on the part of the defendant. What is said at page 250 is particularly referred to, as follows:

"The third and last objection to the sufficiency of the information is that it does not allege that Carrie Barnett had knowledge of the relationship existing between herself and the defendant. The information does allege that defendant had knowledge of the relationship and this is sufficient, under our statute, without alleging that the female also had that knowledge."

It is true the inference may be drawn from the above language that the court in that case might have held that the allegation of knowledge was necessary, if it had been omitted as to the defendant. However, the point raised here was really not decided in that case. On this subject the following statement of the rule appears in Vol. 16, Am. & Eng. Enc. Law (2d ed.), 138:

"Where the statutes are silent as to any *scienter*, as where they do not use the words 'knowingly,' 'wilfully,' or the like in describing the offense, it will not be necessary to allege and prove affirmatively that the defendant knew the

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relationship existing between him and the *particeps*. While this is true, still it would seem, upon reason, that the defendant's ignorance of such fact would constitute a valid defense."

The crime here is charged substantially in the language of the statute, and is sufficient within the rule above stated. See the following cases in support of the rule, as applied particularly to cases of incest: *State v. Bullinger*, 54 Mo. 142; *Simon v. The State*, 31 Tex. Cr. Rep. 186, 20 S. W. 399, 716; *State v. Wyman*, 59 Vt. 527, 8 Atl. 900, 59 Am. Rep. 753; *State v. Dana*, 59 Vt. 614, 10 Atl. 727.

It was held by the United States district court, district of Washington, in *In re Nelson*, 69 Fed. 712, that a statute of Washington territory, similar to the present state statute, was not invalid because of the omission of the word "knowingly," or any equivalent word or phrase, to make knowledge of the relationship an element of the crime. Under the above authorities, we hold here that the court did not err in overruling the demurrer to the information.

It is next assigned that the court erred in excluding evidence, offered by appellant, that the wife of appellant had been, and then was, the duly appointed, qualified, and acting guardian of appellant. Appellant not only denied the commission of the alleged crime, but also interposed the defense of insanity. A record was introduced to the effect that he was adjudged to be insane by a California court in the year 1898, and also another record showing that he was, in September, 1902, adjudged, by the superior court of Spokane county, to be then insane. Following the last adjudication, the said superior court appointed Anna Glinde-mann, the wife of appellant, as his guardian, on the ground that appellant was of unsound mind. It was the record of said appointment that appellants sought to introduce in evidence. It is argued that the fact that appellant

was still under guardianship tended to support the presumption of mental disability. We believe, however, that it could have been no more than cumulative evidence in this case, and that it was not reversible error to exclude it. The record of the actual adjudication of his insanity, made just prior to the guardianship proceeding, was in evidence, and the guardianship record was valuable only for the same purpose for which the insanity record was introduced.

It is further urged that the record was competent as bearing upon the contention that appellant's wife is prejudiced against him in this prosecution. It is argued that, whereas it was her duty as guardian to see that appellant was defended in this action, yet she, in fact, was the instigator of the prosecution. We think the real spirit of the wife's attitude toward the husband can be better shown by other evidence than by this offered record. It was therefore not error to exclude it when offered for that purpose.

It is next assigned that the court erred in disputing the statements of counsel and the shorthand report of two stenographers as to what a certain answer of the prosecuting witness had been, in stating what he believed her answer to have been, in striking out the former answer of the witness, and in permitting her to adopt the court's version of what her answer had been, all in the presence of the jury. This assignment we believe involves error. We are compelled to set forth here a portion of this record, which we would fain omit, but we see no other way to make clear the point raised under this assignment of error. The following is the portion of the record to which we refer:

"Q. What did you mean by saying in cross-examination that you supposed the reason you did not become pregnant was because he did not reach your private parts? A. I don't understand. Q. I understood you to say that the reason you did not become pregnant was that your father's private sexual organ did not reach up to your private parts?

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The Court: She did not say that. Q. Just explain what do you mean by that? Mr. Townsend: Objected to. Objection sustained. Q. Explain what you meant by the answer that the reason you supposed you did not become with child was that it did not reach up to your privates? A. What he passed away. Q. What he passed away did not reach up to your womb, is that what you mean? Mr. Townsend: Objected to. The Court: She did not say that. I don't think the witness said that. [Here the former question from the cross-examination of this witness and her answer was read by the stenographers for the state and for the defendant, as follows: Q. Why? A. Because it did not come up to my privates.] The Court: The stenographers are wrong. She said the reason was because it did not reach up far enough. Q. I will ask you if that is what you said in answer to that question? A. I think I did. Mr. Poindexter: I move to strike out that former answer. The Court: The motion is granted. Mr. Townsend: Exception."

It seems to us that the above extract from the record is largely self-explanatory. Owing to the peculiar nature of the crime charged, it will be seen that the testimony over which the controversy arose was very important. As counsel for both the state and the defense, as well as both stenographers, seem to have understood it, the argument might well have been made to the jury that actual penetration was wanting, and that the crime of incest was therefore not committed. We think the remarks of the learned judge were direct comments upon material testimony in the presence of the jury. It was for the jury to say what the witness had testified, and it was appellant's constitutional right that the court should not express an opinion before the jury upon evidence of such vital importance to his defense. Moreover, the record discloses that the court's remarks, together with counsel's subsequent question, amounted to suggestions to the witness which she readily followed. The well known tendency of jurors to give much

weight to the court's views of the testimony, if they are able to discover what those views are, we think made the remarks of the court prejudicial to appellant's constitutional rights.

We see no essential distinction between the principle involved here and that which was discussed in *State v. Priest*, 32 Wash. 74, 72 Pac. 1024. Counsel argue that there is a distinction, in that the court's remarks in the above case were directed to the jury, while in the case at bar they were directed to counsel. They were, however, made in the presence and hearing of the jury, and in practical effect this case, we believe, should not be distinguished from the one cited. We think the matters discussed under this assignment were so material that they constitute reversible error.

For the foregoing reasons, the judgment is reversed, and the cause is remanded with instructions to the lower court to grant the motion for a new trial.

MOUNT, ANDERS, and DUNBAR, JJ., concur.

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336	278

[No. 4261. Decided March 8, 1904.]

LUDWIG TIMM, *Respondent*, v. SUSAN TIMM, *Appellant*.¹

APPEAL—BRIEFS—PRINTING FINDINGS—DISMISSAL. An appeal will not be dismissed because of the failure of the appellant to print the findings of fact in the opening brief where, after the motion, the findings are printed in appellant's reply brief (*Young v. Borzone*, 26 Wash. 4, followed).

ATTORNEY AND CLIENT—AUTHORITY TO COMPROMISE SUIT—COMPROMISE OF PROPERTY RIGHTS IN ACTION FOR DIVORCE. An attorney is not authorized to settle the property rights of his client in a divorce case without express authority, and none appears where the attorney testified that his client had given him to understand that she ought to have one half of the property, and later wrote him urging him to get the matter fixed up, where

¹Reported in 75 Pac. 379.

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upon he settled property rights valued at \$3,000 by the receipt of notes for \$250, and after being notified of the settlement, the client was dissatisfied therewith and refused to accept the money, and testified that she had never authorized a settlement for less than one half the property.

COMPROMISE—ATTORNEY'S SETTLEMENT—RATIFICATION—DIVORCE—DIVISION OF PROPERTY PURSUANT TO UNAUTHORIZED SETTLEMENT—NO ESTOPPEL BY PARTIAL APPLICATION OF DEPOSIT IN COURT TO PAYMENT OF SUIT MONEY. Where pending a divorce, the defendant's attorney makes an unauthorized settlement of the property rights, accepting \$250 in full for the wife's interest in property of the value of \$3,000, which the wife refuses to accept, and deposits the amount paid to her in the registry of the court, and the court applies \$112 thereof for temporary alimony and attorneys' fees, which the plaintiff had been ordered to pay to the defendant, it is error for the trial court in awarding the defendant a divorce on the ground of plaintiff's cruelty, to find that the settlement is conclusive upon the defendant and to order that her share in the community property be limited to the balance of the sum paid on such settlement, and the defendant is not estopped by accepting the part of the proceeds awarded to her as suit money and alimony; especially since such division is inequitable, and contracts for the division of property made out of court in divorce cases should not be enforced unless fairly made and reasonably just.

Appeal by defendant from a portion of a judgment of the superior court for Adams county, Belt, J., entered December 31, 1901, making a division of property rights, upon awarding defendant a divorce, after a trial on the merits before the court without a jury. Reversed.

O. R. Holcomb, for appellant.

Merritt & Merritt, for respondent.

PER CURIAM.—Plaintiff Ludwig Timm instituted an action for divorce in the superior court of Adams county against defendant Susan Timm, his wife, on the grounds of desertion and abandonment. Defendant answered by denying the material averments in the complaint, and setting up an affirmative defense, alleging cruel and inhu-

man treatment on the part of plaintiff towards herself. The plaintiff filed a reply, denying the material allegations of the affirmative defense. On the 10th day of September, 1900, the cause came on for trial in the lower court. Judgment was given for plaintiff, dissolving the bonds of matrimony theretofore existing between the parties to this controversy.

On the 7th day of March, 1901, the trial court made an order vacating this judgment for divorce, and ordered, further, that plaintiff, Ludwig Timm, pay to the clerk of the court for the benefit of Susan Timm, defendant, on or before March 21st, 1901, \$37 for suit money and \$75 to O. R. Holcomb, Esq., her then attorney, as counsel fees. On the 10th day of April, 1901, the plaintiff having failed to comply with the order of the court regarding the payment of these sums of money, the superior court ordered that the plaintiff show cause, on or before May 27, 1901, why he should not be punished for contempt.

On October 5, 1901, defendant, by her attorney, Mr. Holcomb, deposited in the registry of the court three money orders, payable to the order of Susan Timm, aggregating \$220.85, accompanied by notice to plaintiff and his attorneys that defendant refused to accept the same in accordance with any settlement made by plaintiff and defendant's former attorney, W. W. Zent, and that said attorney Holcomb claimed a lien for his fees on such deposit. On the 17th day of October, 1901, the plaintiff's attorneys served upon Mr. Holcomb a notice, in writing, disclaiming any interest in such postal money orders, and further stating in such notice that, "Said plaintiff hereby further notifies defendant and her attorney that no objection is, or will be, made to any order the court may see fit to make with regard to said moneys, by reason of the fact, hereinbefore stated,

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that said plaintiff has and claims no right or interest in and to said moneys."

On October 28th, 1901, the lower court ordered, "That the clerk of said court deliver to defendant's attorney, O. R. Holcomb, the said three postal money orders, aggregating the sum of \$220.85; that, upon the same being cashed, the said defendant's attorney retain the sum of \$75, heretofore ordered to be paid as attorney's fee, and the further sum of \$37, suit money for the benefit of the defendant, and that the remainder of said sum, to wit, \$108.35, be deposited with the clerk of the court, and retained by him pending the final determination of said suit."

The cause came on for trial on November 18, 1901. The lower court, found, among other things, that the allegations of cruelty and inhuman conduct contained in defendant's affirmative defense were true:

"(5) That, on the — day of January, 1901, and during the pendency of this action, plaintiff and defendant made a full and final settlement of all of their property rights, both community and personal, and plaintiff executed his promissory note for the sum of two hundred fifty dollars (\$250), that being the sum agreed upon in said settlement to be paid to defendant by plaintiff, as her share and interest in and to the property of plaintiff and defendant; and that at the time said note became due plaintiff paid, settled and satisfied said note with the interest thereon in full, and defendant received, accepted and retained said money so paid upon said note."

Conclusions of law were stated upon such findings as follows:

"(1) That defendant is entitled to a decree of divorce, severing the bonds of matrimony existing between plaintiff and defendant. (2) That plaintiff is entitled to all of the property, both real and personal, of every kind and description, belonging to plaintiff and defendant, either as com-

munity or separate property. (3) That defendant is entitled to recover her costs and disbursements in this action."

Defendant excepted to said 5th finding of fact, and the 2nd conclusion of law. Judgment was entered in the action on the findings, in accordance with these conclusions of law; that part of the judgment relating to the property rights of the parties being as follows:

"That plaintiff have and hold, in his own right, and as his separate property, against any and every claim of defendant, all of the property of every kind and description, both real and personal, owned by plaintiff and defendant as community property, or by plaintiff as his separate property, to have and to hold the same forever, as against any claim of defendant."

From this portion of the judgment, this appeal is taken. The appellant assigns that the trial court erred in making finding of fact No. 5, and conclusion of law No. 2, above noted, and in rendering that part of the judgment from which an appeal has been taken in this cause.

The respondent moves to dismiss the appeal herein, because appellant failed to print, in her opening brief, the findings of fact upon which errors are assigned in this court. The appellant thereafter caused to be printed, in her reply brief, all the findings, the conclusions of law, and final judgment. She therefore comes within the purview of the decision heretofore enunciated by this court in *Young v. Borzone*, 26 Wash. 4, 66 Pac. 135. The motion to dismiss the appeal is therefore denied.

The testimony in this record shows that the parties to this controversy intermarried in 1869, in the state of Minnesota; that they have raised a family of four children, all of whom are grown. The testimony in appellant's behalf amply sustain her allegations of cruelty on the part of respondent. It appears that she was a hard working woman, and was about fifty-four years old at the time of

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the trial; that she helped respondent, during the period of their marriage, accumulate real and personal property, prior to the bringing of this action, of the value of more than three thousand dollars.

Respondent contends that the \$250 designated in the findings was paid in pursuance of an agreement entered into between Ludwig Timm and Mr. W. W. Zent, appellant's first attorney in the case at bar. In support of such contention the following written instrument was offered and received in evidence at the trial:

"Ritzville, Washington, Jan. 21, 1901.

"Received of Ludwig Timm a note due October 15, 1901, for \$250, same being in full settlement of all claims of Susan Timm, his former wife, against said L. Timm, this receipt to take effect if said Ludwig Timm shall deliver to W. W. Zent two notes, one for \$150, signed by Mr. Ulm and William Snyder, and one for \$80, signed by L. H. Jones, as collateral security, and if said notes are not delivered this receipt shall not take effect until said note by said Timm is fully paid. W. W. Zent, Att'y for Mrs. Susan Timm."

Mr. Zent subsequently collected the principal and interest on this \$250 note, amounting to \$270.85, and on October 2nd, 1901, wrote Mrs. Timm as follows, regarding this collection:

"October 2nd, 1901.

"Mrs. Susan Timm, Paha, Wash.

"Madam: Enclosed herewith I hand you \$220.85, same being the proceeds from Mr. Timm's note for your part of his property, as per our settlement of January 21, 1901, and interest to date less my fees. Yours very truly, W. W. Zent."

This is the same \$220.85 represented in the postal orders, above mentioned, in the proceedings of the trial court. Respondent testified in regard to this alleged settlement in the following language, in his direct examination:

"Had a settlement of all our property last winter, about January. Mr. Zent, her attorney, and I had the settlement. Mr. Zent told me to pay him \$250, and he would settle everything for her. I had no money, so I gave him two notes [describing them] for a little more than \$250, due last October. Mr. Zent took them, and agreed to cash them or collect them. They were paid. Mr. Zent took the money. I guess he paid it to her [defendant]."

Mr. Zent testified at the trial that, "While Mrs. Timm was at some place in Idaho, she wrote me a time or two, urging me to get the matter fixed up, or settle." On cross-examination, witness said that Mrs. Timm had always given him to understand that she ought to have half of the property, but she told him to get it settled; that, after witness had notified Mrs. Timm of the settlement, she came to his office and told him she was not satisfied; that witness "looked for Mrs. Timm's letter from Idaho, just before coming over to court, and could not find it." The appellant testified:

"I never authorized Mr. Zent to settle for me with Timm, only for half the property, . . . I never told Mr. Zent to settle with Mr. Timm, but always told him to get it settled by the court as soon as possible. . . . I never wrote to Mr. Zent from Idaho telling him to go ahead and settle the best way he could."

In view of the facts appearing in this record, we think that attorney Zent acted without authority in making the alleged compromise between the parties to this action; that whether he supposed he was acting for the best interests of his client in that behalf is an immaterial matter in the consideration of this controversy. The statute, Bal. Code, § 4766, conferred upon the attorney no such authority. In *Hallack v. Loft*, 19 Colo. 74, 34 Pac. 568, the court held that the agreement of an attorney "to surrender or compromise any substantial right of his client

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is beyond the scope of his employment, and is not binding without express authority. His duty is to maintain, not to sacrifice, his client's cause." See, also, *Richardson Drug Co. v. Dunagan*, 8 Colo. App. 308, 46 Pac. 227, and authorities cited.

We now approach the most serious question in the cause. Did defendant ratify this compromise made between Mr. Zent and the respondent, Ludwig Timm, by cashing the postal money orders and receiving the proceeds thereof? At the time of the deposit of this money in the registry of the trial court, Mr. Timm had not complied with the order, made a number of months prior thereto, requiring him to pay \$37 suit money, and the attorney's fee of \$75. A part of the proceeds of these orders were applied towards discharging these two items of suit money and attorney fees; the balance of \$108.85 remained in the custody of the court for further disposition.

It is a general principle of law that subsequent ratification, with full knowledge of the facts, is equivalent to precedent authority. It is also a rule of law, of general application, that when a party has received anything valuable in pursuance of a contract made between him and another party, that the party electing to rescind must place, or offer to place, the other party *in statu quo* by a restoration of the consideration received. This rule of law was enunciated by this court in *Seattle Nat. Bank v. Powles*, 33 Wash. 21, 73 Pac. 887, which was an action at law on a bank check, and in which the defense was a legal one, based on an alleged rescission. This rule regarding restoration of consideration is greatly relaxed in equitable suits and proceedings, as contradistinguished from the enforcement of strictly legal rights and remedies. This distinction, however, has not always been definitely observed by elementary writers, or in the decisions of

the courts. *Clapp v. Greenlee*, 100 Iowa, 586, 69 N. W. 1049; 18 Ency. Plead. & Prac. 837; *Ludington v. Patton*, 111 Wis. 208, 86 N. W. 571.

This alleged settlement arose after the institution of the action for divorce. The court, having jurisdiction over the whole subject-matter and the parties, can do complete equity between them. *Ludington v. Patton*, *supra*. In 2 Bishop, Marriage, Div. and Sep. § 702, the learned author uses the following language:

"It is not *per se* a violation of the law's policy, therefore it is not necessarily nugatory, for the parties to a divorce suit to enter into an agreement as to what alimony shall be allowed, how their property shall be divided, and the like, on the rendition of a decree for dissolution or separation. But if the contract is of a sort to stimulate the divorce, to discourage any defence, or in any way to impose upon the court, it will be void; for example, it will be void if so framed as to have effect only on condition that a divorce is granted without alimony. Hence practically, and almost and sometimes quite as a matter of law, an agreement of this sort should be laid before the judge, when, to an extent not readily definable, it will be ill if he dissents, and good if he approves."

The laws of the state of Iowa relating to the contracts of married women are very liberal in the matter of the removal of all common law disabilities pertaining to such agreements. The supreme court of that state in *Martin v. Martin*, 65 Iowa, 255, 21 N. W. 595, held that contracts made between husband and wife, prior to an action for divorce, with regard to temporary or permanent alimony on the dissolution of the marriage relation, will be recognized. The court there uses the following language: "The courts, however, will in every case scrutinize the transaction very closely, and the contract will not be enforced unless it appears to have been fairly entered into, and to be reasonably just and fair to the wife." We see no

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just reason why this equitable rule should not be applied to such agreements made during the pendency of divorce suits, as well as to such contracts made in contemplation thereof. Furthermore, under our statutory provisions, Pierce's Code, § 4637, Bal. Code, § 5723, these proceedings with reference to the adjustment of the property rights between the spouses are regulated and determined by action of the court in that regard, and not by agreement between the parties. The courts will not lend themselves to anything that will encourage or facilitate divorces, by being too ready to recognize and enforce contracts between husband and wife adjusting their property rights, either before such proceedings are instituted or during their pendency.

Applying these principles to the case at bar, we think that the trial court erred in sustaining the alleged compromise between the parties; that, in cashing the above postal money orders and obtaining their proceeds, appellant is not precluded or estopped from asserting her property rights herein. We are of the opinion that, under the showing made in this record, the appellant is entitled to an equitable division of the property existing at the time this action was begun, in accordance with the provisions of the statute; that appellant should account to respondent, out of her share of such division, for the deposit of \$108.85, and \$50 attorney fee, received by Mr. Zent, with legal interest on such sums, respectively, from the time of the payment of the \$250 note. These parties, on the further hearing of this matter, should be allowed, if they, or either of them, shall see fit, to submit additional testimony as to their respective property rights.

That portion of the judgment appealed from is therefore reversed, and the case remanded to the superior court, with directions to proceed as indicated in this opinion; the costs of this appeal to be taxed against respondent.

[No. 4356. Decided March 3, 1904.]

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C. D. COCHRAN *et al.*, Respondents, v. J. F. YOHO *et al.*,
*Appellants.*¹

MECHANICS' LIENS—FORECLOSURE—COMPLAINT—CONTRACT ABANDONED BY ONE OF THREE CONTRACTORS—PERFORMANCE BY OTHERS ACCEPTED. A complaint for the foreclosure of a mechanics' lien is not demurrable because it appears that one of the three original contractors withdrew from the contract before the work was commenced, where it is alleged that the other two contractors undertook the work and that plaintiff made partial payments to them as the work progressed, and accepted part of the buildings when completed.

SAME—OWNER STOPPING WORK BY EJECTING CONTRACTORS—DAMAGES—EVIDENCE—SUFFICIENCY—FINDINGS WHEN NOT DISTURBED. A finding that the owner of premises forcibly ejected the contractors is sustained by evidence that he locked them out and informed them that one of the contractors would not be allowed to do any more work, because he was dissatisfied with the same, although afterwards the owner gave them written notice to proceed with the work, and the finding that the owner was not justified in stopping the work will not be disturbed on conflicting evidence where the trial court had an opportunity to observe the witnesses.

SAME—NOTICE TO CONTINUE WORK AFTER RESCISSION OF CONTRACT. By wrongfully stopping the work, the owner became liable to the contractors, and after treating the contract as rescinded they were not required to go back to work by receipt of the written notice.

SAME—EVIDENCE OF DAMAGES TO CONTRACTORS—AMOUNT. Upon examination of the testimony an allowance for damages to the contractors is reduced by certain credits to which the owner appears entitled, ordering judgment for \$413.38 instead of \$482.10.

Appeal from a judgment of the superior court for King county, Tallman, J., entered February 24, 1902, upon the findings and decision of the court in favor of plaintiffs, after a trial on the merits before the court without a jury, in an action to foreclose a mechanics' lien. Modified.

¹Reported in 75 Pac. 815.

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Sweeney, French & Steiner, for appellants.

Ira Bronson, for respondent.

PER CURIAM.—This action was commenced in the superior court of King county by C. D. Cochran and A. J. Webb, as plaintiffs, against J. F. Yoho and Mary Yoho, his wife, as defendants. Plaintiffs allege in their amended complaint that, on or about the 14th day of December, 1900, they and one C. L. Huggins entered into a written contract with J. F. Yoho, for the construction of four certain two-story frame buildings upon lot 4 in block 54 of the Second Addition to the city of Seattle. This contract is referred to as an exhibit, and is as follows:

“Seattle, Wash., Dec. 17th, 1901.

“We, the parties of the first part, C. L. Huggins, A. J. Webb and C. D. Cochran, and J. F. Yoho of the second part, do enter into a contract for the construction of four, four part tenement houses to be erected on lot 4, block 54, Sarah A. Bell’s 2nd addition to Seattle, Wash. The parties of the first part agree to furnish all material and labor for construction and completion of said buildings according to plans and specifications for the sum of forty four hundred dollars (\$4400). Said buildings are to be commenced at once and completed as soon as possible. The party of the second part agrees to furnish a sufficient amount of money for the parties of the first part to get the material for said buildings, but at no time to pay any in advance. All bills to be receipted and turned into party of second part before final payment.” [Signed, etc.]

The complaint further alleges that, immediately after the execution of this contract, C. L. Huggins abandoned said contract, and so notified these plaintiffs (Cochran and Webb), verbally, without giving any reasons therefor. That on the 17th day of December, 1900, these plaintiffs commenced to perform labor and furnish materials to be used in the construction of such buildings, the contract price

therefor being \$4,400; that plaintiffs continued to perform said labor and furnish said materials up to and including the 9th day of March, 1901, and, before that time, had completed two of said buildings and delivered the same to said Yoho, who thereupon accepted the same; that on the 9th day of March, 1901, said J. F. Yoho forcibly and unlawfully ejected these plaintiffs from said premises, and refused to allow them to complete said contract; that plaintiffs thereupon were compelled to and did cease to perform any further labor, or furnish any further materials, under such contract; that, when plaintiffs quit said work, an expenditure of \$150 would have completed the two remaining buildings; that the contract price of each building was \$1,100; that defendants are the owners and reputed owners of said premises; that J. F. Yoho advanced to plaintiffs \$3,687.92 under said contract; that there is a balance due plaintiffs of \$712.08, with interest thereon from March 9, 1901; and that, within ninety days after quitting work, plaintiffs made and filed their lien on said premises, for labor and materials so furnished, in the auditor's office of said King county, and the same was duly recorded. Plaintiffs asked judgment for the above amount, and interest, for a foreclosure of their said lien, and costs, including an attorney's fee of \$150, and for general relief. Defendants filed a general demurrer to such complaint, which was overruled. Defendants, by their answer to such amended complaint, put in issue the material allegations thereof; and, for further defense and counterclaim, allege, in part, as follows:

"(2) That in accordance with the terms of said contract the said Cochran, Webb, and Huggins were to construct the said buildings in accordance with certain plans and specifications furnished, and that it was also provided that the lumber furnished was to be of good quality, and that the said houses were to be completed as soon as pos-

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sible. (3) That contrary to the terms of said agreement the said lumber furnished was of an inferior quality and was not suitable for the use to which it was put, the buildings were not and are not constructed in accordance with the plans and specifications provided, and the work was performed in a careless, indifferent, and unworkmanlike manner. (4) That contrary to the terms of said contract after partially constructing said buildings and before the completion thereof and while the same were in an exposed and unfinished condition, these plaintiffs wilfully abandoned said labor, on or about March 9th, 1901, and then refused, and at subsequent times when notified by the said J. F. Yoho to complete the said buildings, refused to further perform labor or to further furnish material. (5) That up to and including the 9th day of March, 1901, when these plaintiffs abandoned said contract as above alleged, the said J. F. Yoho had paid these plaintiffs for use in the said houses the sum of four thousand twenty two dollars and twelve cents (\$4022.12). (6) That the defendant J. F. Yoho was compelled to and did actually expend the further sum of five hundred sixty six dollars sixty nine cents (\$566.69) for the completion of said houses in accordance with the terms of said contract."

The defendants further allege damages in the sum of \$1,500, and ask judgment against plaintiffs for \$1,688.71 on their counterclaim. Plaintiffs in their reply deny each and all the material allegations of new matter contained in the answer.

The cause was tried to the court without a jury on the 6th day of January, 1902, and thereupon the following findings of fact, among others, were made by the trial court:

"(5) That on or about the 6th day of March, 1901, the defendant J. F. Yoho forcibly ejected the plaintiffs from said premises, and refused to allow them to further perform said contract, or to carry the same out or complete the same, and that thereupon the plaintiffs ceased to perform any further labor, or to furnish any further materials,

upon said houses; that all of said labor and materials under said contract were performed and furnished between the 17th day of December, 1900, and the 9th day of March, 1901. (6) That at the time when said defendant J. F. Yoho refused to allow the plaintiffs to further perform said contract, one hundred and fifty dollars would have completed said buildings, including all necessary material therefor. (7) That during the construction of said buildings, it had been agreed between the plaintiffs and the defendant, J. F. Yoho, that four chimneys might be omitted from said houses, for which the plaintiffs agreed to allow the defendants their reasonable cost. (8) That the reasonable costs of said chimneys would have amounted to eighty dollars. (9) That the labor performed and materials furnished, as aforesaid, to be used in and which were used in the construction of said buildings, were furnished to the said J. F. Yoho in accordance with the terms and conditions of said contract, except as in paragraph seven hereof stated. . . . (14) And the court further finds that it was agreed upon the trial of this cause between the plaintiffs and defendants and stipulated therein that, in case said lien was foreclosed and a decree rendered in favor of the plaintiffs, \$150 was a reasonable attorney's fee to be allowed the plaintiff in this cause."

The court thereupon stated the following conclusions of law:

"(1) That the defendants are indebted to the plaintiffs in the sum of \$482.10, together with interest thereon from the 9th day of March, 1901, at the legal rate, aggregating \$510.20, together with an attorney's fee of \$150, and their costs herein, and that the plaintiffs are entitled to a judgment against the defendants for said sums. (2) That the lien, mentioned and described in the findings of fact herein, is a good, first, and valid and subsisting lien upon the premises therein described, and that the plaintiffs are entitled to have said lien foreclosed, and the premises therein described sold by the sheriff of this county, and that the proceeds of such sale be applied in payment of such judgment, attorney's fees, interest, and costs, together with the costs and increased costs of such sale."

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Defendants excepted to each of the above findings and conclusions of law. Defendants also made requests for findings and conclusions, based upon the allegations of their answer and their contentions at the hearing, which were refused by the superior court, to which ruling they duly excepted. Judgment having been entered in conformity with the findings and conclusions of law, the defendants appeal to this court.

Appellants assign errors as follows: (1) That the trial court erred in not sustaining the demurrer to the amended complaint; (2) in making the findings of fact and conclusions of law to which appellants excepted as above noted; (3) in not making certain findings and conclusions of law proposed by appellants.

The main contention of appellants, in support of their demurrer to the above complaint, is based upon the proposition that it appears from such pleading that the original contract for the construction of these buildings was entered into between respondents and one Huggins, as parties of the first part, and J. F. Yoho, appellant, as party of the second part, and that said Huggins withdrew from the work, and that there is no allegation in the complaint of knowledge or consent to such withdrawal on the part of the owner, J. F. Yoho. Respondents, in their amended complaint, among other things, allege that, immediately after the execution of the contract, the said C. L. Huggins abandoned said contract, that respondents commenced to perform labor and furnish materials for the erection of these structures from December 17, 1900, and continued in so doing up to and including March 9, 1901, and before that time had completed two of said buildings and delivered the same to appellant, Yoho, who accepted the same. For the purposes of this demurrer, these allegations must be taken as true. Giving these averments a reasonable and liberal

interpretation, they show that respondents performed labor and furnished materials to appellants between the above dates, by reason whereof the latter were benefited; that appellants accepted respondents' work, and the materials furnished by them, in erecting and finishing the two structures above named. The complaint further alleges that appellants paid respondents a large sum of money on account of such contract. Considering the complaint as a whole, we think it fair to assume, from the allegations thereof, that the appellants knew that respondents were the parties with whom they were dealing in these transactions; that the other party, C. L. Huggins, was not concerned therein; and that appellants, having knowingly dealt with respondents in the premises, became liable to them for furnishing the labor and materials alleged in this complaint. We are therefore of the opinion that this pleading states a cause of action, and that the superior court committed no error in overruling appellants' demurrer to the amended complaint.

Appellants contend there was no evidence to justify the finding of the trial court that "defendant Yoho forcibly ejected plaintiffs from said premises." Respondent Cochran testified that, "on Monday, about the 4th or 5th of March, 1901, when we arrived at the premises, Yoho hadn't got there, we found our tools were locked up and we waited a few minutes for Yoho. I asked him if he wanted us to go to work on the coal shed; he said, 'No,' he would not let us go to work at all; he said he would not let us have anything to do with it, he would not have anything to do with us any more, especially me; said he would not allow me around there; and we came around to see Mr. Bronson, and Mr. Bronson was not in his office, and when we came back he had our tools there on the back porch, and would not let us in at all." Respondent Webb substanti-

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ally corroborates, in his testimony, Cochran's statements on this branch of the controversy. This witness also stated that on the above occasion Yoho remarked to him, "Well, there can't be any work here until this thing is adjusted, . . . you and I can get along all right and do this work, but Cochran can never drive another nail here." Witness Strum, in behalf of respondents, testified that he was engaged to paint the house, and was discharged by Yoho. Appellant Yoho, referring to this matter about locking up respondents' tools, testified: "They stated I had the tools locked up. They had a key to the room themselves." Respondent Webb denied having any key, and testified that only one key came with each rim lock. Cochran testified that Yoho got the keys from him on the Saturday night previous to this Monday morning when respondents quit work, in order to clean out one of the flats, so that a tenant of appellants might move in. Appellant Yoho on his cross-examination testified: "Q. You told me (Bronson) you didn't have any objection to Mr. Webb, but that Mr. Cochran could not work there any more? A. Yes sir, I told you that."

It further appears from Yoho's evidence that, at and prior to the time respondents quit working on these buildings, he was very much dissatisfied with the quality of the work thereon, and that disagreements between him and Cochran were frequent; that, within a day or two after the alleged ejectment of respondents, appellant Yoho served a written notice upon Webb, Cochran, and Huggins that, unless they proceeded at once with the construction of these four buildings, he would consider that they had abandoned the work, and look to them for whatever damages he might sustain thereby. Respondents admit the receipt and service of this notice upon them.

We have examined the testimony carefully with reference to the finding of fact of the trial court above noted, regarding the question whether the respondents voluntarily abandoned their contract, or whether appellant Yoho forced them to quit working on these buildings, and conclude that there was sufficient evidence to justify this finding. On the face of the record, the preponderance of the testimony seems to support the contentions of respondents as to that feature of the controversy. In arriving at this conclusion, we have taken into consideration the testimony of appellant J. F. Yoho and his witnesses with reference to the poor quality of the work performed on these structures, whereby Yoho claims he was justified in stopping work thereon. This evidence was directly in conflict with the testimony adduced in respondents' behalf, which tended to show that appellant J. F. Yoho rushed the work in order to get the buildings ready for tenants to occupy, that during much of the time while the buildings were in course of erection, the weather was unfavorable to good workmanship, especially as regards the plastering, which did not have an adequate opportunity to dry. There was also considerable testimony in behalf of respondents to the effect that the job was a good one. If the evidence in appellants' behalf was true, they were justified in refusing to allow respondents to proceed with the work, in violation of their contract, which is the basis of the present action. The trial court, who saw the witnesses and heard their testimony while giving their evidence at the trial, had better opportunities than we possess for judging as to the credibility of individual witnesses, and the weight that should be given to their testimony, and found against appellants on this very important feature in the case. Under well settled rules of law frequently announced by this court, we do not feel warranted in

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interfering with that finding. See, *Washington Dredging etc. Co. v. Partridge*, 19 Wash. 62, 52 Pac. 523, and authorities cited.

Treating the above finding as a verity for the purposes of this controversy, we are constrained to hold, as a matter of law, that appellants, by wrongfully stopping the work on these buildings, rendered themselves liable to respondents in damages. We are of the opinion that the fact of appellants having given notice to respondents and Huggins to proceed with the work does not affect respondents' right to recover in the case at bar; that the latter, by the acts of J. F. Yoho, had a right to treat the contract as rescinded, and they could not legally be required to go back to work on those structures, under the original contract; that J. F. Yoho, being the party at fault, under the findings of the trial court, in causing respondents to quit work, must bear the consequences of his own acts. "Where one of the parties to a contract, either before the time for performance or in the course of performance, makes performance or further performance by him impossible, the other party is discharged and may sue at once for the breach." 9 Cyc. 639, and authorities cited.

It is admitted that, during the progress of the above work, appellants advanced \$3,687.92 under the contract. The trial court found that, when respondents quit work, \$150 would have completed said buildings, including all necessary materials therefor. We think that, on the respondents' evidence, appellants should have been allowed an additional credit of \$25, making the sum total of \$175 to be deducted from the contract price for labor and material necessary to complete the buildings. Under the testimony the cost of the erection of eight chimneys should have been deducted from the contract price for the completion of the buildings. The trial court allowed

a credit of \$80 for only four chimneys. The estimated value of these chimneys, according to the evidence, at the time respondents quit work, was 70 cts. per running foot. The testimony is somewhat ambiguous as to the actual lineal measurement of these chimneys, but, after a careful consideration of the matter, we have concluded that a deduction of \$123.70 must be allowed appellants from the contract price, instead of \$80, as found by the superior court. Deducting these total credits, amounting to \$3,986.12, from \$4,400, the contract price, leaves a balance of \$413.88; and for this amount, together with interest at the legal rate from March 9, 1901, and the costs and attorney's fees allowed by the lower court, we direct judgment to be entered by the lower court.

No costs shall be taxed in favor of either respondents or appellants on this appeal. This cause is therefore remanded with directions to enter judgment in conformity with this opinion.

[No. 5032. Decided March 8, 1904.]

THE STATE OF WASHINGTON, *on the Relation of Pluma*
M. Harris, Plaintiff, v. SUPERIOR COURT FOR
 KING COUNTY, *Respondent*.¹

CERTIORARI—TO REVIEW ORDER VACATING JUDGMENT—ADEQUATE REMEDY BY APPEAL. A writ of review will not be granted to review an order vacating a default judgment in a tax lien foreclosure and allowing the defendant to appear and defend where no emergency is shown, since there is an adequate remedy by appeal from the final judgment, and it is against the policy of the law to try cases by piecemeal.

Application filed in the supreme court, January 12, 1904, for a writ of review to review an order of the

¹Reported in 75 Pac. 809.

Mar. 1904.]

Opinion Per MOUNT, J.

superior court for King county, Tallman, J., entered December 11, 1903, vacating a default judgment in a tax lien foreclosure. Writ denied.

E. F. Kienstra, for relator.

R. R. George and *G. E. De Steiguer*, for respondent.

MOUNT, J.—Original application for a writ of review. It appears from the affidavit of the petitioner that, in July, 1903, the relator, Pluma M. Harris, brought an action in the superior court of King county against William Levy and Jane Doe Levy, whose true name was unknown, to foreclose certain certificates of delinquent taxes. Summons was served upon defendants by publication. On October 7, 1903, a judgment was entered by default, foreclosing the certificates for the amount due. Subsequently the real estate upon which the taxes were a lien was sold and bid in by the petitioner, and a deed issued. Thereafter the defendants in said action filed a motion to vacate and set aside the judgment. This motion was granted on the 11th day of December, 1903, and the judgment vacated, and defendants permitted to defend the action. The plaintiff, relator here, now prays for a writ of review in this court to review the order vacating the judgment.

The writ of review will only be granted where there is no appeal and no plain, speedy, and adequate remedy at law. Section 5741, Bal. Code. It is true there is no appeal from an order vacating a judgment. *Nelson v. Denny*, 26 Wash. 327, 67 Pac. 78. But there is in this case a plain and adequate remedy by appeal from the final judgment which may be entered in the case, in which appeal the order herein complained of may be reviewed. *Freeman v. Ambrose*, 12 Wash. 1, 40 Pac. 381. It is not the policy of the law to try cases here by piecemeal.

Every order which is not appealable is not the subject of a writ of review. No emergency is shown why the questions, presented for review by the petition of relator, may not as well and effectively be determined after final judgment in the case as at this time. Furthermore, if plaintiffs are successful at the final trial, there will be no necessity for a review of the questions now presented. The fact that the remedy by appeal is not as speedy as by writ of review is not, of itself, a sufficient reason for granting the writ. When no rights will be lost by delay, time will not be considered, unless the delay renders other remedies inadequate.

The writ is therefore denied.

HADLEY, ANDERS, and DUNBAR, JJ., concur.

[No. 4619. Decided March 11, 1904.]

MARTIN C. WELSH, *Appellant*, v. S. A. CALLVERT *et al.*,
as the Board of Land Commissioners, etc.,
Respondents.¹

PUBLIC LANDS—DEED OF STATE—FINDINGS AS TO CHARACTER OF TIDE LANDS—COLLATERAL ATTACK—CLAIM THAT LANDS SOLD AS SECOND CLASS TIDE LANDS ARE OYSTER LANDS. A deed from the state purporting to convey all tide lands of the second class owned by the state abutting upon a certain described shore line, which was sold at the price fixed by law for second class tide lands, must be considered as made after a finding of the state land department as to the character of the land, nothing to the contrary appearing in the record, and includes all the abutting tide lands; and such deed being analogous to a patent is not subject to collateral attack by a subsequent application to purchase a portion of the same lands as oyster lands, upon the theory that the statutory definition of tide lands, Laws 1897, p. 230, § 4, excepts oyster lands, and that the deed conveyed, therefore, only such part of the abutting tide lands as were not suitable for the cultivation of oysters.

¹Reported in 75 Pac. 871.

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Opinion Per HADLEY, J.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered December 29, 1902, affirming on the merits an order of the board of state land commissioners rejecting plaintiff's application to purchase oyster lands, after a trial before the court without a jury. Affirmed.

John T. Welsh and Martin C. Welsh, for appellant.

The Attorney General and E. W. Ross and C. C. Dalton, for respondents.

HADLEY, J.—Appellant applied to the commissioner of public lands of the State of Washington to purchase certain lands in Skagit county, and which the application describes as "oyster" lands. The application was rejected by the board of state land commissioners, for the reason that the same lands had been theretofore sold and conveyed by the state to John Cryderman. The lands were sold to said Cryderman as second class tide lands. The appellant appealed from the decision of said board to the superior court of Skagit county. That court affirmed the decision of the board, and this appeal is from the judgment of the superior court.

Appellant contends that the lands are oyster lands and not tide lands, and we are referred to Session Laws, 1897, p. 230, § 4, subd. 2, for the legislative definition of tide lands, the same being as follows:

"Tide Lands: All lands over which the tide ebbs and flows from the line of ordinary high tide to the line of mean low tide, except in front of cities where harbor lines have been established, or may hereafter be established, where such tide lands shall be those lying between the line of ordinary high tide and the inner harbor line, and excepting oyster lands."

It is insisted, that the above definition of what shall

be known as tide lands specially excepts oyster lands from such classification; that said act of 1897, by § 39 thereof, classifies tide and shore lands into what are known as tide lands of the first class and second class; and that, by reason of the exception of oyster lands from the general definition of tide lands, they are a class to themselves, not belonging to either class of tide lands, and cannot be sold as such. It is insisted by appellant that even the application of Cryderman to purchase these lands states that they are suitable for the cultivation of oysters. A copy of the application is before us. It appears to have been prepared upon a printed form whereon blank spaces were left to be filled. The following is included in the application: ". . . that said land is ----- suitable for the cultivation of oysters, . . ." It will be observed that the blank space was evidently left, in the first instance, to be filled with some word negating the oyster character of the land, when such is the fact. That it was not so filled, in this instance, respondents argue was due to mere oversight, inasmuch as the application repeatedly refers to the lands as tide lands, and specifically designates them, and asks to purchase them as tide lands of the second class.

But, in any event, whether the failure to fill the blank was an oversight or not, it nowhere appears in this record that the board of state land commissioners did not find as a fact that the lands were not suitable for the cultivation of oysters, and that they were second class tide lands. A deed conveying these lands was executed and delivered by the state to Cryderman, in consideration of \$473.65, paid by the latter. Appellant does not, as we understand him, contend that the deed is absolutely void, but that it conveys only second class tide lands within the described area, and does not convey oyster lands

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therein. He therefore reasons that the oyster lands within the area are still open for sale and conveyance.

The deed purports to convey "all tide lands of the second class owned by the state of Washington situate in front of, adjacent to, or abutting upon that portion of the government meander line described as follows." Then follows a description of the meander line, making a total in all of 94.73 chains. The price fixed by law for second class tide lands is \$5 per lineal chain, and the amount of consideration named in the deed shows that exactly that sum was paid, based upon the number of chains above mentioned. It is evident, therefore, that both grantor and grantee in the deed understood that all lands in front of the described meander line were second class tide lands, and were conveyed by the deed. The state was the owner of all the lands within the area, and they were for sale. For reasons already stated, the deed itself shows that the state's officials found that the lands were all tide lands of the second class, and that they were sold and conveyed as such. We therefore think it cannot be urged, in a collateral attack such as this one, that the deed did not convey all that was intended. Although appellant disclaims an attack upon the deed, and admits that it conveys all tide lands of the second class within the specified area, yet his claim that it does not convey all the lands within the area which the parties evidently intended to convey is an attack upon it.

The deed, having been made by the state, and purporting to convey a portion of its public lands, is analogous to a patent issued by the United States for a portion of the public domain, and is governed by similar legal principles. The state has created a land department, with administrative and executive functions similar to the land department of the general government. That de-

partment is authorized to supervise the proceedings by which title is sought to be obtained to any portion of the state's public lands. Having supervised such proceedings in a given case, and having caused the deed of the state to issue, it becomes, in effect, the patent of the state, and cannot, under the rules established as to federal land patents, be collaterally attacked. In this connection the language of Mr. Justice Field, in *St. Louis Smelting Co. v. Kemp*, 104 U. S. 636, 640, 26 L. Ed. 875, is particularly pertinent. Because of its weight and direct applicability here, we quote at length:

"That the provisions may be properly carried out, a land department, as part of the administrative and executive branch of the government, has been created to supervise all the various proceedings taken to obtain the title, from their commencement to their close. In the course of their duty the officers of that department are constantly called upon to hear testimony as to matters presented for their consideration, and to pass upon its competency, credibility, and weight. In that respect they exercise a judicial function and, therefore, it has been held in various instances by this court that their judgment as to matters of fact, properly determinable by them, is conclusive when brought to notice in a collateral proceeding. Their judgment in such cases is, like that of other special tribunals upon matters within their exclusive jurisdiction, unassailable except by a direct proceeding for its correction or annulment. The execution and record of the patent are the final acts of the officers of the government for the transfer of its title, and, as they can be lawfully performed only after certain steps have been taken, that instrument, duly signed, countersigned, and sealed, not merely operates to pass the title, but is in the nature of an official declaration by that branch of the government to which the alienation of the public lands, under the law, is intrusted, that all the requirements preliminary to its issue have been complied with. The presumptions thus attending it are not open to rebuttal in an action at law."

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Again, in the same opinion, when speaking of the presumptions attending patents for lands, the learned Justice said:

"Of course, when we speak of the conclusive presumptions attending a patent for lands, we assume that it was issued in a case where the department had jurisdiction to act and execute it; that is to say, in a case where the lands belonged to the United States, and provision had been made by law for their sale."

So, in the case at bar, the lands all belonged to the state, and, being for sale, under the law the land department had jurisdiction to act and execute a conveyance. In *Steel v. Smelting Co.*, 106 U. S. 447, 1 Sup. Ct. 389, 27 L. Ed. 226, the same principle is discussed. Speaking of the land department and its functions, the court remarked, as found at page 451 of said volume:

"Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation. Such has been the uniform language of this court in repeated decisions."

At page 454, the same opinion, speaking of a patent issued by the government, says:

"It cannot be vacated or limited in proceedings where it comes collaterally in question. It cannot be vacated or limited by the officers themselves; their power over the land is ended when the patent is issued and placed on the records of the department. This can be accomplished only by regular judicial proceedings, taken in the name of the government for that special purpose."

In *French v. Fyan*, 93 U. S. 169, 23 L. Ed. 812, a question somewhat similar to the one at bar was involved. A patent had been issued for swamp and overflowed land.

Testimony was offered to show that it was not such land. The following appears in the opinion at page 172:

" . . . and we are of opinion that, in this action at law, it would be a departure from sound principle, and contrary to well-considered judgments in this court, and in others of high authority, to permit the validity of the patent to the state to be subjected to the test of the verdict of a jury on such oral testimony as might be brought before it. It would be substituting the jury, or the court sitting as a jury, for the tribunal which Congress had provided to determine the question, and would be making a patent of the United States a cheap and unstable reliance as a title for lands which it purported to convey."

The following cases cited are in harmony with the principles above discussed, and support the view that the decision of the land department is conclusive on the courts when a patent, issued in pursuance of such decision, is collaterally attacked: *Ferry v. Street*, 4 Utah 521, 7 Pac. 712, 11 Pac. 571; *Palmer v. Boorn*, 80 Mo. 99; *Biddle Boggs v. Merced Min. Co.*, 14 Cal. 279; *McKinney v. Bode*, 33 Minn. 450, 23 N. W. 851; *Baker v. Newland*, 25 Kan. 25; *State ex rel. Marsh v. Board of Land Com'rs*, 7 Wyo. 478, 53 Pac. 292.

As we have seen, under the authority of *Steel v. Smelting Co.*, *supra*, a patent cannot be vacated or limited by the officers themselves. It can only be accomplished by judicial proceedings, taken in the name of the government for that special purpose. By analogy we think the rule applies here.

The judgment is affirmed.

MOUNT, ANDERS, and DUNBAR, JJ., concur.

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Syllabus.

[No. 4923. Decided March 11, 1904.]

THE STATE OF WASHINGTON, *Respondent*, v. MOSES
DRUXINMAN, *Appellant*.¹

RECEIVING STOLEN PROPERTY—INFORMATION—SUFFICIENCY. An information charging that the defendant bought and received "stolen property," knowing that it was stolen property, is sufficient without further alleging as a fact that it was stolen since the inference that it was stolen is in substance the statement of a fact, and the information enables a person of common understanding to know what was intended.

TRIAL—VERDICT ON CONFLICTING EVIDENCE NOT SET ASIDE. A verdict of guilty will not be set aside upon conflicting testimony where the evidence for the state warrants the verdict.

TRIAL—ORDER OF PROOF—ADMISSION OF EVIDENCE IN REBUTTAL—DISCRETION OF COURT. The order of proof is largely in the discretion of the trial court, and unless injustice has been done, a case will not be reversed for the admission of evidence in rebuttal which might have been presented on the state's case in chief.

RECEIVING STOLEN PROPERTY—KNOWLEDGE THAT SAME WAS STOLEN—INSTRUCTIONS. Upon a prosecution for receiving stolen goods, it is proper to instruct that defendant's knowledge of the theft need not be direct, and that it is sufficient if the circumstances were such as to make the defendant believe that they were stolen.

TRIAL—INSTRUCTIONS—WEIGHT OF THE EVIDENCE OF EACH WITNESS. It is not error in instructing that it is the duty of the jury to give proper weight to the testimony of each witness to fail to give any definition of the meaning of proper weight.

JURY—MISCONDUCT—NEW TRIAL—IMPROPER REMARK NOT INFLUENCING THE VERDICT. The fact that a juror stated in the jury room that the defendant had been tried several times on similar charges is not ground for a new trial on account of the improper conduct of a juror, where it does not appear that the remark had any influence upon the verdict.

Appeal from a judgment of the superior court for King County, Bell, J., entered July 11, 1903, upon a trial and

¹Reported in 75 Pac. 814.

conviction of the crime of receiving stolen property. Affirmed.

Ballinger, Ronald & Battle, for appellant.

W. T. Scott and Elmer E. Todd, for respondent.

DUNBAR, J.—The defendant was convicted of buying, receiving, and aiding in the concealment of stolen goods, knowing the same to have been stolen. The following errors are assigned on appeal: (1) Error in overruling objection to the introduction of any evidence; (2) error in denying motion, at the close of the state's case, to instruct the jury to acquit; (3) error in overruling challenge to the sufficiency of the evidence, interposed at the close of the case, and denying motion for an instructed verdict of acquittal; (4) error in admitting certain testimony in rebuttal; (5) error in instructions given to the jury; (6) error in overruling motion for a new trial; (7) error in overruling the motion for arrest of judgment; (8) error in rendering judgment.

The first assignment of error is based upon the alleged insufficiency of the information to state a cause of action. The information alleges that the defendant "wilfully, unlawfully, and feloniously did buy, receive, and aid in the concealment of the following stolen property . . . [describing property], then and there being the property of the Northern Pacific Railway Company, a corporation, and the said Moses Druxinman then and there having bought, received, and aided in the concealment of the same, knowing that said property, and all thereof, was stolen property." It is insisted by the appellant that, unless the property was stolen, the defendant could be guilty of no crime, and hence the fact that the property was stolen is a material fact, and must be alleged as well

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as proved; and it is asserted that this information nowhere alleges or states the fact that the property was stolen; that the allegation that the defendant did buy and "aid in the concealment of the following stolen property," and the further allegation that the defendant bought, received, and aided in the concealment of the same, knowing that it was stolen property, is only the statement of an inference that the property was stolen, and that an inference is not sufficient in a criminal case, but that the fact must be alleged. It would seem that there could certainly be no room for any other inference from the language of the information than the inference that the property was stolen, and the language, therefore, is in substance the statement of a fact. The test of the validity of the information, so far as this question is concerned, is, does it enable a person of common understanding to know what was intended? There can be no doubt that the defendant was plainly informed by this information of the nature of the crime the commission of which he was charged with. We think the information was in all respects sufficient.

The second assignment raises the question of the sufficiency of the testimony to sustain the judgment. The testimony was conflicting, and, if the testimony of the state's witnesses was believed by the jury, it would warrant the verdict returned. The jury being the judge of the credibility of the testimony, we do not feel justified in this case in interfering with its determination. What is said with reference to this assignment will apply equally to the third assignment of error.

It is contended that the court erred in admitting certain testimony in rebuttal which, it is insisted, was admitted out of its regular order. The testimony was in relation to the defendant's previous acquaintance with

Fagan, who had stolen the property and sold it to the defendant, and also to the manner in which Fagan was dressed at the time of the sale of the property to the defendant; it being contended that this testimony was properly testimony which should have been presented in the opening of plaintiff's case, and that some testimony bearing on that subject had been introduced by the state in its case in chief. But an examination of the record discloses the fact that this testimony was called out by the statement of counsel for defense to the jury, and, in addition to that, the order in which testimony is admitted in the trial of a cause is ordinarily largely in the discretion of the trial court; and, without it appears that injustice was done to one of the parties to a suit by the submission of testimony in this way, the court would be loath to reverse a cause on this ground. In this case it affirmatively appears that the defendant was not prejudiced by the admission of the testimony.

The court among other instructions gave the following:

"One of the essential ingredients of this crime is knowledge, on the part of the buyer or receiver, that the goods have been stolen, and this knowledge must exist at the time of the receipt or purchase of the goods. This, however, need not be such direct knowledge as comes from witnessing a theft. It is sufficient that circumstances were such accompanying the transaction as to make the defendant believe the goods had been stolen."

We are unable to discover any error in this instruction. It seems to be a plain and correct statement of the law governing such cases.

The court further instructed the jury that, "It is your duty to give the proper weight to the testimony of each and every witness who has testified before you," and it is claimed that the court in effect told the jury by this

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instruction that the testimony of every witness must have proper weight, and gave no definition of the meaning of proper weight. We think this contention is hypercritical, and that the jury was not in any way misled by the instruction complained of.

It is urged in support of the sixth assignment that the motion for a new trial, among other things, was made upon the ground of misconduct of the jury, and in support of this motion the defendant filed the affidavits of two jurymen showing that, immediately upon the election of the foreman, one of the jurors, whose name is not disclosed by the affidavits, stated that he remembered that the defendant had been brought up several times before on similar charges, that he had forgotten this at the time he was examined upon his voir dire, but remembered it as the case progressed. It does not appear from the affidavits that this remark had any influence upon the verdict of the jury, and it might be a matter of common knowledge, of which each particular juror was possessed, that the defendant had been tried before for a similar crime. But such knowledge would not be sufficient to disqualify a juror from sitting in the trial of a cause under an independent charge of the same character of crime. There was no error of the court in denying the motion for a new trial on this ground. Nor does it appear that the jurors who tried the cause were not proper jurors under the law governing their selection.

The judgment is affirmed.

HADLEY, ANDERS, and MOUNT, JJ., concur.

[No. 4929. Decided March 11, 1904.]

THE STATE OF WASHINGTON, *Respondent*, v. JOSEPH STOCKHAMMER, *Appellant*.¹34 262
88 274

CRIMINAL LAW—TRIAL—SEPARATION OF THE JURY—CONSENT OF DEFENDANT. A case will not be reversed because of the separation of the jury without the consent of the defendant, when the counsel for defendant consented thereto in the presence and hearing of the defendant.

SAME—ADMONITION AS TO DUTIES UPON ADJOURNMENT. It is not prejudicial error to fail to admonish the jury as to its duties on each adjournment where the admonition had been once given.

EVIDENCE—CONCLUSION OF WITNESS. It is not error to sustain an objection to a question calling for the conclusion of the witness as to the feeling of another person which prompted an act, where the witness was permitted to testify to the act, since that fact was all he could properly testify to.

CRIMINAL LAW—MOTION FOR ACQUITTAL—SUFFICIENCY OF EVIDENCE. Where there was sufficient testimony introduced by the state to warrant a conviction if uncontradicted, a dismissal or verdict of acquittal should not be directed.

HOMICIDE—EVIDENCE OF DEFENDANT'S INSANITY—COMPETENCY UNDER PLEA OF SELF-DEFENSE. In a prosecution for a homicide it is not prejudicial error to exclude evidence of an adjudication of insanity and a discharge from the hospital as improved, where there was no plea of insanity, the defense being self-defense, especially where defendant was afterwards allowed to prove that he had been confined in the asylum on a charge of insanity.

HOMICIDE—SELF-DEFENSE—NECESSITY OF WARNING—INSTRUCTIONS. In a prosecution for a homicide an instruction as to the right of the defendant to take the life of another in self-defense is properly qualified by adding that it was the duty of the defendant to first warn his assailant to desist from his attack, unless he was justified in believing that he had no time to give such warning.

SAME—REASONABLENESS OF BELIEF THAT LIFE IS IN DANGER. An instruction as to the right of self-defense if the defendant believes his life is in danger, is properly qualified by adding "if he has reason to believe" in such fact, since it is only a reasonable belief that will warrant the act.

¹Reported in 75 Pac. 810.

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Appeal from a judgment of the superior court for Chelalis county, Irwin, J., entered November 25, 1902, upon a trial and conviction of the crime of manslaughter. Affirmed.

C. W. Hodgdon and Sidney Moor Heath, for appellant.

J. A. Hutcheson, for respondent.

DUNBAR, J.—The appellant was charged in the information with murder in the first degree, was convicted of manslaughter, and sentenced to two years in the penitentiary.

The first assignment is that the court erred in allowing the jury to separate without the consent of the defendant personally. It is conceded that the consent was given by the counsel of appellant, but the contention is that this is not sufficient. Section 6947, Bal. Code, provides that juries in criminal cases shall not be allowed to separate except by consent of the defendant and the prosecuting attorney. Appellant cites *State v. Place*, 5 Wash. 773, 32 Pac. 736, and *Brown v. State*, 38 Tex. 483, in support of the contention that the conditions of the statute have not been complied with. *State v. Place* does not in any manner support such contention, as it does appear in that case that there was no consent given by either appellant or counsel. *Brown v. State* was a case where the defendant was not present during the trial, he being in an adjoining room, sick, having been removed by the instruction of his attending doctor during the argument; and, while the court in that case incidentally held that the attorney for the defendant could not consent to the jury's separating, under the particular provisions of the code, it was also said that, even if the defendant himself had consented, the case would still have to be reversed, for the reason that

the separation was not such a separation as was provided for by the code. But we think there are no cases which hold, under the provisions of a statute such as ours, that the consent of the counsel, the defendant being present and hearing the consent announced by the court, is not sufficient. In fact, we think it is much the better practice, and is a more orderly proceeding, and a consent which is more likely to be intelligently given, than a mere formal consent stated by the defendant. By reference to *State v. Holedger*, 15 Wash. 443, 46 Pac. 652, it will be seen that the procedure in this case was exactly in accordance with the suggestion of this court made to the trial judges of the state. It will be noted that, in that case, the consent was obtained from appellant's counsel, and the court refused, even under the circumstances of the case, to reverse the judgment for that alleged error alone, but said:

"The appellant complains in his ninth assignment that the court erred in asking counsel for appellant, in the presence and hearing of the jury, if they had any objection to the separation of the jury. In the absence of any proof to the effect that the appellant was prejudiced in any way by the action of the court, we do not feel like reversing a case on this ground alone; but we desire to take occasion to say that considering the difficulty of making such a showing of injury by the party who claims to be aggrieved, we think it is a practice which should not be indulged in by trial courts, because, as appellant complains, if they did entertain any objection to the separation of the jury they were called upon to so state in the presence of the jury, and would thereby run the risk of incurring the displeasure of some juror. The court could very easily call counsel to him and ascertain privately and without the knowledge of the jury whether there were any objections to their separation."

This course having been pursued by the trial court in this case, no error was committed.

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The next contention is that the court allowed the jury to separate without being admonished and instructed as to its duties. It is conceded that the court did, upon the first separation of the jury, give them full admonition concerning their duties, as provided by the statute; but that, upon the next separation, the admonition was not given. The admonition having been once given, it was not necessary to repeat it; and, especially as no request was made therefor by the appellant, it will not be presumed that he was prejudiced by the failure of the court to give repeated admonitions.

It is claimed that the trial court erred in sustaining respondent's objection to the following question, proposed by appellant's counsel on cross-examination: "Mrs. Stockhammer, is it not true that your brother had such a bitter feeling against Mr. Stockhammer, that, in giving you a check, he refused to write it as Maria Stockhammer, but wrote it as Maria Eigner?" Objection was sustained to this question, and we think properly sustained, as calling for a mere opinion of the witness as to the motives of the deceased in preparing the form of a check. All that the witness could properly testify to was the fact, and it was for the jury to determine from such fact the feeling which prompted it, and the following question, viz., "Is it not true that your brother, in giving you a check, gave it to you as Maria Eigner, instead of Maria Stockhammer?" was afterwards asked and answered without objection.

The fourth assignment is that the court erred in refusing to allow appellant's motion to dismiss, or direct a verdict at the close of plaintiff's testimony. No error was committed in this respect, as there was sufficient testimony introduced by the state to warrant a conviction, if uncontradicted.

The fifth assignment is that the court erred in sustaining the objection of plaintiff to the introduction of evidence concerning the insanity of defendant. The evidence was a certified copy of the record of Pierce county, including a complaint in insanity, and an order adjudging defendant insane made by the superior court of Pierce county, and also a discharge from the hospital for the insane as improved. It is insisted by the appellant that it may be shown, in aid of the theory of present insanity, that insanity existed at some prior time. This testimony was objected to as being irrelevant, immaterial, and inadmissible, unless it should be followed up by showing that the condition of insanity still exists, and did exist at the time of the shooting. There was no plea of insanity in this case, the defense being self-defense, no attempt to show that insanity existed at the time, and the counsel for the defense objected to making such a showing, by stating that a condition once shown to exist is presumed to exist until the contrary is shown. This presumption would, in any event, be destroyed by the testimony which the counsel for the defense was attempting to offer, which showed that the defendant had been discharged from the asylum. But, in any event, under the proofs and claims made by the defendant in this case, the testimony was inadmissible; and, even if it were admissible, no prejudice obtained, from the fact that the defendant afterwards was allowed to prove that he had been confined in the asylum in Pierce county on a charge of insanity.

Errors numbers six and seven are based on the modification or qualification attached by the court to instruction No. 15. Instruction No. 15 was as follows:

"The court informs you that, in law, the defendant, if he was where he had a right to be, if the deceased advanced upon him in a threatening manner or induced de-

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defendant to believe that he was in danger of life or limb, the defendant need not retreat, but had a right to stand his ground and defend himself. When a man is where he has a perfect right to be, and deceased so acts under such circumstances as to induce in him a reasonable and honest ground of apprehension that he is in danger of life or limb, he may at once use necessary force to prevent the threatened blow, even to the extent of taking his life."

Then the court announced the qualifications which are objected to, as follows:

"Gentlemen: I qualify this instruction No. 15 in this way, that although defendant may have been where he had a right to be, and deceased was advancing toward him in a threatening manner, still he would have no right to take the life of deceased without first warning him to desist from his attack, unless you find from the evidence that defendant was justified in believing that he had not time to give such warning."

We think that this was a proper and judicious statement of the law. No man should be permitted to take the life of another without an urgent necessity exists, for the right of self-defense is based upon the necessity of protecting one's self; and, if one's life could be protected and the necessity of killing the adversary obviated by a warning, such warning should be given. It does not appear to us that the modification of this instruction was made more prominent than any other part of the instruction.

In assignment eight it is also contended that the court erred by the insertion of the words "and has reason to believe," in instruction No. 18, the whole instruction being:

"The court further instructs you that a man need not wait until the blow is actually struck before he has a right to act upon appearances and defend himself. It is enough if he honestly believes, and has reason to believe,

from the attitude, conduct and manner of the deceased, that he was in danger of his life or of great bodily harm."

If the appellant's objection should obtain, that the court erred in inserting the words "and has reason to believe," all that a defendant would be called upon to do, to establish a complete defense, would be to assert that he believed that he was in danger of life or of great bodily harm. This must not be a blind belief, but must be a belief founded upon circumstances, and it is for the jury to determine, under all the circumstances of the case, whether it is a reasonable belief. The rule is laid down by 1 Bishop's New Criminal Law, § 305, as follows:

"If, in the language not uncommon in the case, one has *reasonable cause to believe* the existence of facts which will justify a killing,—or, in terms more nicely in accord with the principles on which the rule is founded, if without fault or carelessness he does believe them,—he is legally guiltless of the homicide; though he mistook the facts, and so the life of an innocent person is unfortunately extinguished."

So that it will be seen that, if a person acted without reason, he would not be acting without fault or carelessness. We think the whole instruction of the court was favorable to the appellant.

We perceive no error of the court in refusing instructions offered, all the instructions which properly stated the law having been given in another form by the court. Nor can the last assignment—that the court erred in denying defendant's motion for a new trial—be sustained.

The cause was tried without error, and the testimony was sufficient to sustain the judgment. It will therefore be affirmed.

HADLEY, ANDERS, and MOUNT, JJ., concur.

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[No. 4913. Decided March 11, 1904.]

W. A. DAWSON *et al.*, Respondents, v. J. B. McMILLAN
et al., Appellants.¹

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435	495
34	269
142	48

WATERS—NAVIGABILITY—SUFFICIENCY OF EVIDENCE. A channel in a slough forming an arm of Puget Sound, which, while the tide ebbs and flows therein, is used as a public highway for boats and for rafting and towing logs, is navigable water, since it is navigable in a legal sense if it is in fact, although it may not be navigable at low tide.

SAME—BED OF NAVIGABLE WATERS—SALE BY STATE—OBSTRUCTIONS BY PURCHASER. The sale of tide lands by the state is subject to the paramount right of the public in the navigable waters thereon, and confers no right to obstruct navigation therein.

SAME—PUBLIC NUISANCE—OBSTRUCTION TO NAVIGATION—WHO MAY MAINTAIN ACTION—PARTIES SPECIALLY INJURED. Owners of timbered lands whose only means of getting logs to market is by the use of certain navigable waters, are specially damaged by an obstruction of the same which prohibits such use of the waters, and may maintain an action to enjoin such obstruction as a public nuisance.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered March 26, 1903, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, restraining the obstruction of navigation. Affirmed.

Elihu R. Sherman and *C. H. Hurlbut*, for appellants.

T. E. Cade and *Smith & Brawley*, for respondents.

MOUNT, J.—Plaintiffs brought this action for an injunction restraining defendants from obstructing navigation in the branch of the sea known as McElroy's slough, and for a mandate requiring the removal of such obstruction already made by defendants. After issues joined

¹Reported in 75 Pac. 807.

and a trial had, the lower court granted the relief prayed for. The defendants appeal.

No question is made here on the findings of the lower court, and they are therefore to be taken as true. They are as follows:

“(1) That at all of the times in plaintiffs’ complaint mentioned and hereinafter mentioned, the plaintiffs have been and are now copartners doing business under the firm name and style of W. A. Dawson & Co.; that during said times the said defendant Union Boom Company has been and now is a corporation duly organized and existing under and by virtue of the laws of the state of Washington, having its principal place of business at Fairhaven, Whatcom County, Washington, and that during said times the defendants J. B. McMillan and Frances C. McMillan have been and now are husband and wife.

“(2) That plaintiffs are the owners of a large quantity of timber lands lying along and adjacent to a certain slough in Skagit county, Washington, commonly called ‘McElroy’s slough,’ which said slough enters into Bellingham Bay, the same being an arm of Puget Sound, which said slough so enters said Bellingham Bay west of lots 1 and 2 in Sec. 21, Tp. 36, north, range 3 east of the Willamette Meridian, in said Skagit county, and which said slough extends back in length about four miles from the mouth of said slough through sections 21 and 22; and that there is a channel, the same being well defined and about three to four feet in depth, extending from the mouth of said slough out into said Bellingham Bay for a distance of one and one-half miles; that said channel is from 70 to 100 feet in width, and that down this channel there is constantly flowing a channel of fresh water averaging during the year from 4 to 24 inches in depth at the deepest, and from 20½ feet to 40 feet in width; that twice each day the tide ebbs and flows up said channel and slough and over portions of the tide flats to a depth of from 7 to 9 feet, and which tide covers all the flats surrounding said slough; that, while the said tide is in, and while so flowing and ebbing, the said channel and slough

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is navigable, and has been and can be used as a public highway for boats, scows, and other ordinary modes of water transportation for general commercial purposes, and especially for the rafting, booming, and floating, and towing logs up and down the same; that said slough has been so used for at least twenty years prior to the time of the commission of the acts complained of by plaintiffs in their complaint.

“(3) That sufficient fresh water does not flow down said slough at any time to keep it navigable or floatable with the fresh water alone, but that said slough is only navigable and floatable with the aid of the salt water, and that at ordinary low tide there is no salt water in said slough.

“(4) That the plaintiffs, at and for two years prior to the commencement of this action, were engaged in logging off their said lands, which lands are adjacent to said slough, and that they have been taking the timber from said land, placing the same in said slough, there rafting and placing them in sections ready for market, in the usual manner practiced by loggers, and towing the same down said slough and into said Bellingham Bay, and thence to market; that plaintiffs have no other feasible or practicable way by which the plaintiffs can convey their said timber to the market only down said slough and channel; and that plaintiffs are the owners of a large quantity of standing timber, to wit, about 4,000,000 feet, on their lands, for which there is no other outlet or way to market, save and except down said slough and channel.

“(5) That on or about the 11th day of February, 1903, the defendants Union Boom Company and J. B. McMillan procured a pile driver and piles, and, with the aid of such pile driver and piles, they drove piles in the said channel as shown by the plaintiffs' exhibit No. 1, to wit, a row of piles along the south bank of said channel, and other piles in the center of said channel, which piling, so driven by defendants, were driven into the ground permanently and is a permanent obstruction to navigation of said slough and channel, and deprives plaintiff of the use of said slough and channel for the purpose of towing

their logs down the same to market, and hinders and destroys navigation in said slough and channel; and that, by reason of the location and manner in which said piles were so driven in the bed of said slough and channel, hereinbefore described, the said plaintiffs have been, and now are, unable to get any of their said logs to market; and that, if the said piling are allowed to remain there, plaintiffs will be unable to, and will be prohibited from logging off their said lands or to remove the products of said lands and timber to market; and that it will be impossible for boats to navigate said slough.

"(6) That some time during the year 1902, and prior to the driving of said piles into said slough by defendants, as aforesaid, a line of railway was constructed a few feet east of where said piles were so driven, and a railway bridge was constructed across said slough; that the piles which are in the fresh water channel, and nearest said bridge, are opposite the bents of said bridge; and that any logs or other timber products, boats, and scows that can go under the said railway bridge can float down the fresh water channel of said slough without obstruction on account of the piles driven by defendants; that the openings under the railroad bridge, through which the fresh water flows down through said slough, are 21 feet and 15 feet in width.

"(7) That, prior to the erection and construction of said railway bridge, the plaintiffs, and other persons along said slough, rafted their said logs and placed them into sections ready for market a considerable distance above said bridge, and where said slough is of considerably greater width than where said bridge is erected; that, after the erection of said bridge, and prior to the 11th day of February, 1903, the said plaintiffs and said other persons so rafted their said logs immediately below said bridge; and that steamboats and tugboats would come up said slough and tow said logs in rafts and booms to market; that, prior to the erection of said bridge, said boats navigated said slough above said bridge, and for considerable distance above the same; that the piling driven by defendants extend from the bridge and down

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said slough for a distance of 900 feet and that beyond such piling it is unsafe and impracticable to raft and boom logs; that it is impossible for boats to go up said slough and take said logs down the same, and it is impossible to pass logs down said slough in rafts and booms on account of said piling.

"(8) That the defendant Union Boom Company has a contract with the State of Washington for the purchase of all of the second class tide lands in front of said lots 1 and 2; that said contract was duly issued and is still in force; that the meander line runs some distance east of the piles in question, and directly across said McElroy's slough about 100 feet east of the railroad; that said tide lands contract purported to convey to said defendant Union Boom Company all second class tide lands in front of, adjacent to, and abutting upon, said meander line, and that all of the piles in question are outside of said meander line and within the boundaries of said contract.

"(9) That none of the piles in question were driven for the personal use or benefit of the defendant J. B. McMillan, but they were driven under his direction as manager of the defendant Union Boom Company; that the location of the meander line across said McElroy's slough is shown in defendant's Exhibit A; that said piles were being driven by said Union Boom Company for a boom.

"(10) That the defendant Frances C. McMillan had nothing to do with and was not interested in the driving of said piles."

The conclusions are as follows:

"(1) That this action should be dismissed as to the defendant Frances C. McMillan. (2) That the plaintiffs are entitled to an order of this court forever restraining and enjoining the defendants J. B. McMillan and Union Boom Company and each of them, their officers, agents, servants, and employees, from driving piling or placing any other obstruction within the bed or channel of said McElroy's slough, as described in plaintiffs' complaint, or in the channel thereof where the same passes over and extends across the tide lands between the mouth of said

McElroy's slough out to the deep water of Bellingham Bay. (3) That the plaintiffs are entitled to a mandatory injunction compelling the said defendants to remove all piling placed by them or their agents, servants, officers, or employees, in the said channel of said slough, as aforesaid, so that the said plaintiffs may have free and uninterrupted use of said slough for the purpose of ordinary navigation. (4) That plaintiffs should have judgment for their costs and disbursements herein."

Appellants excepted to the second, third, and fourth conclusions; and argue, (1) that the channel of the slough is not navigable under the law; (2) that if it is navigable, it is under the control, disposition, and authority of the state; (3) that the action is prematurely brought, and under improper allegations.

The channel of the slough in question is navigable in a legal sense if it is in fact navigable. 21 Am. & Eng. Enc. Law (2d ed.), pp. 426, 429; *East Hoquiam Boom Co. v. Neeson*, 20 Wash. 142, 54 Pac. 1001; *Griffith v. Holman*, 23 Wash. 347, 63 Pac. 239, 54 L. R. A. 178, 83 Am. St. 821; *Watkins v. Dorris*, 24 Wash. 636, 64 Pac. 840, 54 L. R. A. 199. In the second finding of fact the court found that the tide ebbs and flows in the slough twice each day, and that "while so flowing and ebbing the said channel and slough is navigable, and has been and can be used as a public highway for boats, scows, and other ordinary modes of water transportation for general commercial purposes, and especially for rafting, booming, and floating, and towing of logs up and down the same; that said slough has been so used for at least twenty years." This finding, which we must take as an admitted fact in the case, precludes any question of the navigability of the slough.

Being navigable water, when the state sold the bed

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thereof to the appellants, as stated in the finding No. 8, appellants took the title subject to the paramount right of the public to use the same for navigation. *Watkins v. Dorris*, *supra*, p. 644; *New Whatcom v. Fairhaven Land Co.*, 24 Wash. 493, 64 Pac. 735, 54 L. R. A. 190. The fact, therefore, that the title of the bed of the channel, or the land upon which an obstruction is placed, is vested in the appellants, does not confer upon them the right to obstruct navigation upon navigable water. It is no doubt true that the sovereign authority may control and regulate the use of navigable waters, but it does not follow that an individual, over whose lands such waters flow, may do the same. *People v. St. Louis*, 5 Gilm. (Ill.) 351, 48 Am. Dec. 339. By the mere act of selling the land to the appellants, the state conferred no right upon them to interfere with the rights of the public in the use of the highway.

Appellants' last position is based upon the claim that the United States is the only party having a right to prevent the obstruction, and that respondents are not injured until they are denied free passage. It has been frequently held by this court that, where, by a public nuisance, a private party is specially damaged, his damage differing in kind and degree from that of the general public, he may maintain an action to abate such nuisance. *Carl v. West Aberdeen Land Co.*, 13 Wash. 616, 43 Pac. 890; *Smith v. Mitchell*, 21 Wash. 536, 58 Pac. 667, 75 Am. St. 858; *Griffith v. Holman*, 23 Wash. 347, 63 Pac. 239, 54 L. R. A. 178, 83 Am. St. 821; *Sultan W. & P. Co. v. Weyerhaeuser Timber Co.*, 31 Wash. 558, 72 Pac. 114; 21 Am. & Eng. Enc. Law (2d ed.), p. 444. By findings Nos. 4, 5, and 7, it is shown that respondents are specially damaged, and also that the obstruction exists, and that respondents are

prohibited from using the highway and from removing their timber products to market.

The relief granted was, therefore, proper under the findings, and the judgment is affirmed.

HADLEY, ANDERS, and DUNBAR, JJ., concur.

34	276
34	445
34	639
34	276
38	15
34	276
41	133
41	135

[No. 4603. Decided March 11, 1904.]

JEFFERSON COUNTY, *Respondent*, v. JOHN TRUMBULL
et al., *Appellants*.¹

TAXATION—FORECLOSURE OF COUNTY DELINQUENCY CERTIFICATES—SUMMONS—SUFFICIENCY. Where a summons in a general tax foreclosure states that the names of the reputed owners precede the description of the land, and that it was assessed to them, and the property is described, it sufficiently appears that the names where known were those given, and also what lands were sought to be subjected to the lien for taxes, and a motion to quash the summons is properly overruled.

APPEAL—REVIEW—HARMLESS ERROR ON ADMISSION OF EVIDENCE. In an action triable *de novo* on appeal, error cannot be predicated on the admission of incompetent evidence.

TAXATION—FORECLOSURE OF LIEN—DELINQUENCY CERTIFICATE BOOKS—COMPETENCY WHEN OFFERED EN MASSE. An objection that tax certificate books are incompetent does not raise the point that they related to much other property and were offered *en masse* without reference to any particular page or entry; and in the absence of any demand for particularization their admission is not error.

SAME—BOOKS CERTIFIED BY SUCCESSOR OF OFFICER. Certificate books in the possession of the county treasurer may be certified to by the successor in office of the treasurer who issued them.

SAME—DATE OF ISSUANCE OF CERTIFICATES—IDENTITY OF BOOKS HOW SHOWN. Tax certificate books are competent when it appears from the certificate of the proper officer that the certificates of delinquency therein were issued by the proper officer after four years from the date of delinquency, and where the identity of the

¹Reported in 75 Pac. 876.

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Citations of Counsel.

books as intended certificates of delinquency further appears from the pages of the books, which were filed with the clerk of the superior court prior to the application for judgment and the issuance of judgment thereon.

SAME—CERTIFICATES OF DELINQUENCY IN BOOK FORM. Tax certificate books are not incompetent because the law at the time did not expressly authorize their issuance in book form.

SAME—FORECLOSURE OF LIEN AN EQUITABLE PROCEEDING—CORRECTION OF MISTAKES. While the foreclosure of delinquency certificates is properly a statutory proceeding the law expressly invokes the equity powers of the court, authorizing amendments and the correction of mistakes, and the entry of judgment on the merits, as the justice of the case requires (*Smith v. Newell*, 32 Wash. 369, followed).

Appeal from a judgment of the superior court for Jefferson county, Hatch, J., entered August 15, 1902, after a trial on the merits before the court without a jury, foreclosing delinquency tax certificates. Affirmed.

Trumbull & Trumbull, for appellants, contended, *inter alia*, that this is a special statutory proceeding and all the statutory forms and the methods of procedure prescribed must be strictly complied with. Black, Tax Titles, §§ 198-200; Cooley, Taxation, p. 481; *Gilchrist v. Dean*, 55 Mich. 244, 21 N. W. 330; *Simms v. Greer*, 83 Ala. 263, 3 South. 423; *McWilliams v. Great Spirit etc. Co.* (Kan.), 52 Pac. 905; *Hughes v. Linn County*, 37 Oregon 111, 60 Pac. 843; *Potts v. Cooley*, 51 Wis. 353, 8 N. W. 153; *Hilgers v. Quinney*, 51 Wis. 62, 8 N. W. 17; *McGahen v. Carr*, 6 Clarke (Iowa), 333; *Kellogg v. McLaughlin*, 8 Ohio 115; *Mayhew v. Davis*, 4 McLean 213, Fed. Cas. No. 9,347; *Randolph v. Barbour*, 6 Wheat. 128; *Jackson v. Shepard*, 7 Cowen 88, 17 Am. Dec. 502; *Westbrook v. Miller*, 64 Mich. 129, 30 N. W. 916; *Gilchrist v. Dean*, *supra*; *Clark v. Crane*, 5 Mich. 151, 71 Am. Dec. 776. The filing of the certificates with the clerk of the court in due statutory form is jurisdictional. *Simms v. Greer*, *supra*; *People v.*

Otis, 74 Ill. 384; *Bleidorn v. Abel*, 6 Iowa, 5, 63 Am. Dec. 428; *Thatcher v. Powell*, 6 Wheat. 119; *Morrill v. Swartz*, 39 Ill. 108; *Charles v. Waugh*, 35 Ill. 315; *Fox v. Turtle*, 55 Ill. 377; *Marsh v. Chesnut*, 14 Ill. 223; *Stilwell v. People*, 49 Ill. 45; *Mix v. People*, 81 Ill. 118; *Durham v. People*, 67 Ill. 417; *St. Anthony Falls Water Co. v. Greeley*, 11 Minn. 321; *Burns v. Ledbetter*, 54 Tex. 374; *Wellshear v. Kelley*, 69 Mo. 348; *Stambaugh v. Carlin*, 35 Ohio St. 209; *Lawrence v. Zimpleman*, 37 Ark. 643; *Flint v. Sawyer*, 30 Maine 226; *Newkirk v. Fisher*, 72 Mich. 113, 40 N. W. 189; *Huntington v. Brantley*, 33 Miss. 451; *State v. Kirby*, 6 N. J. L. 143; *Wartensleben v. Haithcock*, 80 Ala. 565; *Fleming v. McGee*, 81 Ala. 409, 1 South. 106; *Hough v. Hastings*, 18 Ill. 312; *Upton v. Kennedy*, 36 Mich. 216; *Thompson v. Burhans*, 61 N. Y. 52; *Hughes v. Linn County, supra*; *Belden v. State*, 46 Texas 103. This is not an equitable suit; equity has no jurisdiction to collect taxes. *Pierce County v. Merrill*, 19 Wash. 175, 52 Pac. 854; *People v. Biggins*, 96 Ill. 481; *Board of Com'rs v. First Nat. Bank*, 48 Kan. 561, 30 Pac. 22; *Corbin v. Young*, 24 Kan. 199; *Louisville Trust Co. v. Muhlenberg County (Ky.)*, 23 S. W. 674; *Green County v. Murphy*, 107 N. C. 36, 12 S. E. 122; *McHenry v. Kidder County*, 8 N. Dak. 413, 79 N. W. 875; *Board of Education v. Old Dominion Iron Co.*, 18 W. Va. 441; *Thompson v. Allen County*, 115 U. S. 550, 6 Sup. Ct. 140. It is a special proceeding to be strictly construed, and the principles of equity do not at all apply. *Territory v. Delinquent Tax List etc. (Ariz.)*, 21 Pac. 888, and cases cited therein; *Wason v. Bigelow*, 11 Colo. App. 120, 52 Pac. 636; *Perry v. Washburn*, 20 Cal. 318; *Young v. Dowling*, 15 Ill. 481; *Altes v. Hinckler*, 36 Ill. 265, 85 Am. Dec. 406; *Forster v. Forster*, 129 Mass. 559. As to

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such statutable powers, equity follows the law, and defective execution cannot be aided by equity. 2 Blackwell, Tax Titles, §§ 1078, 1079; *Grudley's Heirs v. Phillips*, 5 Kan. 349; *Stewart v. Stokes*, 33 Ala. 494, 73 Am. Dec. 429; *Kearney v. Vaughan*, 50 Mo. 284; *Smith v. Bowes*, 38 Md. 463.

J. M. Ralston (A. W. Buddress, of counsel), for respondent, contended, among other things, that under the new system of enforcing tax liens by a suit in equity, the rules contended for by appellants do not apply. *Fisher v. People*, 84 Ill. 491; *Atlantic & P. R. Co. v. Yavapai County* (Ariz.), 21 Pac. 768; *Maish v. Territory*, 164 U. S. 599, 17 Sup. Ct. 193, affirming *Delinquent Tax etc. v. Maish* (Ariz.), 37 Pac. 730; *Haley v. Elliott*, 20 Colo. 379, 38 Pac. 771; *Otoe County v. Brown*, 16 Neb. 394, 20 N. W. 274, 641; *Denman v. Steinbach*, 29 Wash. 179, 69 Pac. 751; *Meagher v. Sprague*, 31 Wash. 549, 72 Pac. 108; *Otoe County v. Mathews*, 18 Neb. 466, 25 N. W. 618; *Chicago & N. W. R. Co. v. People*, 174 Ill. 80, 50 N. E. 1057; *State v. Central Pac. R. Co.*, 10 Nev. 61; *State v. Northern Belle Min. Co.*, 15 Nev. 385; *State v. Nevada Cent. R. Co.*, 26 Nev. 357, 68 Pac. 294, 69 Pac. 1042; *Mason v. Belfast Hotel Co.*, 89 Me. 384, 36 Atl. 624; *Bucksport v. Buck*, 89 Me. 320, 36 Atl. 456; *Kipp v. Dawson*, 31 Minn. 373, 17 N. W. 961, 18 N. W. 96; *Manseau v. Edwards*, 53 Wis. 457, 10 N. W. 554; *Ure v. Reichenberg*, 63 Neb. 899, 89 N. W. 414; *Torrey v. Millbury*, 21 Pick. 64; *Parker v. Sexton*, 29 Iowa 421; *Rhodes v. Sexton*, 33 Iowa 540. The provisions will not be regarded as mandatory if the rights of the party are not prejudiced, and substantial compliance is sufficient. *Seattle v. Clark*, 28 Wash. 717, 69 Pac. 407; *French v. Edwards*, 13 Wall. 506; *Turpin v. Lemon*, 187 U. S. 51,

23 Sup. Ct. 20; *Western Union Tel. Co. v. Indiana*, 165 U. S. 304, 17 Sup. Ct. 345.

HADLEY, J.—This is a tax foreclosure proceeding whereby the county of Jefferson seeks to foreclose as to certain taxes, the action being based upon alleged delinquency certificates issued to said county. The appellants alleged, by way of answer and objections, that they are the joint owners of certain lots and tracts of real estate involved in the application for judgment; that no certificates of delinquency were ever issued to the county, as against their property, and that no taxes were ever assessed or levied against said property for the year 1895, or any previous year included in the application. A trial was had and judgment of foreclosure rendered. This appeal brings the judgment here for review as to these appellants.

It is first assigned that the court erred in overruling appellants' motion, on special appearance, to quash the process in the action. The motion is urged upon the following alleged grounds: (1) that the summons does not purport to give notice to the owners of the land, in that it neither purports to state the names of the owners nor to whom the lands were assessed, but simply purports to notify the reputed owners; (2) that it does not appear from the summons when the certificates of delinquency were issued by the county treasurer to the county; (3) that the summons does not inform the defendants against what lands it is sought to foreclose the lien for taxes.

Referring to the first point mentioned, the summons does state that the name of the reputed owner precedes the description of the land, and that the lands were assessed to such reputed owner. That makes it sufficiently clear that the names where known are those which appear upon the treasurer's rolls as the owners of the property. Under

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the present statute it is expressly declared that, for the purposes of foreclosure, such shall be considered and treated as the owners, and that, if upon the treasurer's rolls it appears that the owner is unknown, then the proceedings shall be against the property as belonging to an unknown owner. Pierce's Code, § 8694, Session Laws, 1901, pp. 385-6, § 3. The above statute controlled the remedy when this summons was published.

The second point urged under the motion to quash seems to be answered by the summons itself, which expressly states that the certificates of delinquency were issued to Jefferson county on January 31, 1898; and we are unable to see force in the third point, as the descriptions of the property are stated in the summons, and it seems to us that it is made clear to the defendants in the action what lands are sought to be subjected to the lien for taxes by the foreclosure. We think the court did not err in denying the motion to quash.

Several alleged errors are assigned that certain immaterial and incompetent evidence was introduced over objection. But this court has often said that it will, on trial *de novo*, consider only what it deems to be competent evidence, and will not reverse a judgment if there is sufficient competent testimony to support it.

It is assigned that the court erred in admitting in evidence, over objection, respondent's exhibits A to G, inclusive. These exhibits comprise seven large bound books, which were offered and received in evidence as certificates of delinquency. It is first urged that the books were offered in a mass, and that no particular volume, page, or entry was pointed out. Doubtless a demand for such particularization, if made in the court below, would have been granted. It certainly would have been a reasonable request

for the convenience of court and counsel. The certificate books, however, related to much other property in which appellants do not claim to be interested. Foreclosure in the same action was sought against many hundreds of other lots and tracts, and if, when the books were offered in evidence, these appellants desired to have pointed out the books and pages which related to their property, they should have made such a request. The mere fact that respondent did not point them out in the first instance, if in truth they existed, did not render the evidence incompetent. The only objection made was that the books were incompetent and that no foundation for their introduction had been laid. This objection did not reach the point above suggested, and, unless it had been brought to the attention of the court below, we shall not hold that the court erred in not requiring the books and pages to be designated at the time they were received in evidence.

The objection that the books were not competent, however, raises the most serious question in this case. The certificate attached to the back of each book, with variation as to the number of the volume referred to, is as follows:

"State of Washington, County of Jefferson, ss:

"I, T. J. Tanner, treasurer of Jefferson county, state of Washington, do hereby certify that this book number 1 is one of seven volumes, which said seven volumes contain the original certificates of delinquency or delinquent tax certificates, which said certificates of delinquency were duly issued by the treasurer of Jefferson county, state of Washington, on or about January 31st, A. D. 1898, to said Jefferson county, for taxes duly levied and delinquent upon the real property described in said certificates of delinquency and in each and all of said seven volumes containing said certificates of delinquency, as aforesaid, for taxes due to said Jefferson county and including all other taxes payable to said Jefferson county for the years 1891, 1892, 1893, 1894, and 1895, as shown by this volume and each

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and all of said seven volumes. And I do hereby further certify that said seven volumes, as aforesaid, of which this is one, contains all the certificates of delinquency issued by said treasurer of Jefferson county to said Jefferson county, as hereinbefore set forth, and that each and all of said volumes numbered one, two, three, four, five, six, and seven are the certificates of delinquency issued by the treasurer of Jefferson county, Washington, as hereinbefore set forth, to said Jefferson county, for taxes due and delinquent upon the property described in said certificates of delinquency and payable to said Jefferson county for the year A. D. 1895 and prior years.

"Dated this 24th day of October, A. D. 1901.

"(Seal) T. J. Tanner,

"Treasurer of Jefferson County, Washington."

It is urged that the county treasurer, who certified to the above, certified that the book certificates were issued at a date prior to the time he entered upon the duties of his office. He was, however, county treasurer, and, if the certificate was a proper one for that officer as such to make, he had as much power to make it as his predecessor. Under § 98, pp. 182, 183, Laws 1897, which was in force when these certificates might have been first issued, no particular time is designated for issuing the certificate to the county. It is only necessary that the property shall remain on the assessment rolls, and that no certificate of delinquency may have been sold to individuals. In the next amended statute upon this subject, § 15, p. 297, Laws 1899, no specific time is mentioned except that the certificates to the county shall not issue until after four years from the date of delinquency; and in the next, Laws 1901, p. 385, § 3, the time is merely fixed at five years after delinquency. Thus no time is mandatorily fixed for issuing the certificates. It is directorily provided that they shall issue after certain dates, but it is not stated that it shall be done immediately. They were issued in this instance after the proper date

and by an officer competent to issue them. While it is true one date is named as the date of issuance, and a subsequent one as the date of signing, yet since either date was at a time when certificates to the county could be properly issued, and since they are signed by a competent official, we think they became competent as evidence.

In addition to what was contained in the so-called certificate set out above, each page of the books contained other matter showing manifestly that the books were intended to be, and were prepared as, certificates of delinquency issued to the county. At the top of each page is the following: "Certificate of Delinquency Issued to Jefferson County, Washington." Upon each page also appears the description of the property, name of owner when known, year of assessment, valuation, amount of tax, and over the final column is the following: "Amount of County's Certificate." The books are also marked as filed with the clerk of the superior court of Jefferson county December 30, 1901, which was prior to the application for judgment and issuance of summons in this action.

It is urged that the law at the time these taxes became delinquent did not authorize the issuance of these certificates to the county in book form. It is true that plan was first specifically mentioned in the amendment of 1899, *supra*, but it does not follow that the act of 1897, *supra*, intended that a separate slip of paper, called a certificate, should be issued by the county to itself for each of the thousands of delinquent lots and tracts of lands. Such a course would, in some instances, have been so burdensome as to have been impracticable. In the absence of such an intention expressly stated in the act of 1897, we think it may well be concluded that the act of 1899 merely declared specifically what was before the real intention of the legislature in that regard.

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Appellants offered no evidence but, after respondent rested, moved for judgment in their favor on the ground that respondent had failed to prove a case by competent evidence. The motion was overruled, and the court made findings which it is claimed are not sustained by evidence. We think there was sufficient evidence to sustain the findings, and appellants did not show that they were in any way injured.

Respondent argues that this is a proceeding in equity, that the court sitting in equity will regard that done which ought to have been done, and that all necessary amendments touching the seeming irregularities were made. Appellants upon the other hand insist that this is not a proceeding in equity, but is a special proceeding under the statute not governed by equitable principles, and that each step outlined in the statute must be strictly pursued. While perhaps it may more properly be called a statutory proceeding, yet the statute, § 8697, Pierce's Code, § 18, p. 299, Laws 1899, and § 103, pp. 184, 185, Laws 1897, provides that the court may vacate and set aside the certificate, or make such other order as in law and equity may be just. Thus the equitable powers of the court in the premises are recognized by the statute, and the same section also specifically authorizes the making of amendments and the correction of errors of the taxing officers, even to the extent that these may be "supplied and made to conform to law by the court." In *Smith v. Newell*, 32 Wash. 369, 73 Pac. 369, this court broadly interpreted the above statute as we believe it was intended in the interest of all concerned. The court said:

"This provision of the statute it seems to us was intended to enable the courts to correct just such omissions as were made by the treasurer in this instance. It was intended to put it in the power of the court on the hearing of a tax

foreclosure suit to render judgment as the evident justice of the case required. That is, it was intended that the courts should inquire into the merits of complaints made against tax proceedings and allow them to prevail only when the matter complained of operated to the injury of the complaining party and is incurable by any judgment that can be entered in the foreclosure proceedings."

We think the above language is particularly applicable here. No injury is shown to have resulted to appellants.

Objection is made in this court to the form of the decree, but we are unable to see that appellants are injured by its terms. Counsel upon both sides have prepared elaborate briefs, and have cited many authorities to support their respective arguments. A review of them all is impracticable, and we believe it unnecessary to further extend the discussion of the case.

The judgment is affirmed.

MOUNT, ANDERS, and DUNBAR, JJ., concur.

[No. 4799. Decided March 11, 1904.]

KATHERINE M. SNYDER, *et al.*, *Respondents*, v. O. G. HARDING, *Appellant*.¹

LANDLORD AND TENANT—EJECTMENT—LEASE NOT EXECUTED BY WIFE—ACCEPTANCE OF RENTS—RESCISSION OF LEASE—FINDINGS OF FACT—CONCLUSIONS OF LAW WHEN SUPPORTED. In an action to recover possession of premises from a former tenant under a lease which was invalid because not joined in by the wife and another joint owner, in which the court finds at the request of the defendant that rent was received thereunder so that the wife and joint owner might be estopped by the acceptance of rent, a conclusion of law that the lease is invalid is supported by the further finding to the effect that the lease had been subsequently mutually rescinded, since such conclusion is not based wholly upon the non-execution of the lease.

¹Reported in 75 Pac. 812.

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SAME—RESCISSION OF LEASE BY ACTION TO COMPEL CONVEYANCE—ACCEPTANCE OF RESCISSION BY SUIT TO RECOVER POSSESSION. Where a tenant in possession begins an action for specific performance of an alleged contract of sale to him, he rescinds the lease, and an action to recover possession by the landlord is an acceptance of such rescission, and the rescinded lease gives the tenant no standing in court.

SAME—RESCISSION OF LEASE—WHEN WITHIN PLEADINGS. In an action to recover possession of premises in which the complaint alleges that defendant is in wrongful possession, claiming some interest in the land, and the answer sets up a lease, and the reply avers facts showing a mutual rescission of the lease, the feature of the rescission of the lease is within the issues properly presented by the pleadings.

SAME—DEFENDANT NOT A TENANT—PLEADINGS—RESTITUTION. In such a case the action does not fall on the ground that it was prosecuted against defendant as a tenant, because a writ of restitution issued, where the complaint does not allege that defendant was a tenant, since Bal. Code, §5500, authorizes such an action against one not a tenant.

EJECTMENT—JOINT OWNERS—PARTIES PLAINTIFF—UNITY OF TITLE. In an action for the recovery of premises, part of which is owned by a husband and wife jointly with a third person, all the owners are proper parties plaintiff although they do not own the premises by unity of title, where the action arises out of a common cause against the same party, since all having an interest may unite in a single suit.

Appeal from a judgment of the superior court for Adams county, Neal, J., entered April 21, 1903, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to recover possession of real estate and to quiet title. Affirmed.

O. R. Holcomb, for appellant.

Merritt & Merritt, for respondents.

HADLEY, J.—The statement of facts in this cause was stricken at the time of the hearing. Therefore the only questions to be determined are whether the conclusions of law properly follow from the findings of the court, and

whether the judgment is sustained by the findings and conclusions, and is within the issues.

The complaint is for the possession of real estate, and also prays that plaintiffs' title thereto shall be quieted. It is alleged that the plaintiffs George S. Snyder and Katherine M. Snyder are husband and wife, and that they hold an ownership in said real estate as a community. The lands are alleged to be owned by said community and by their co-plaintiff, Charles D. Snyder. It is also alleged that the defendant wrongfully entered into possession of the land; that he now wrongfully holds it, and claims some interest therein which is unfounded and without right. The defendant answered that he leased the premises from the plaintiffs by an agreement with the plaintiff George S. Snyder; that, with the consent and approval of plaintiffs, he entered into possession, proceeded to cultivate the land, delivered to them the share of the crops as rent, and that the same was accepted by them.

The reply alleges, that the plaintiffs Katharine M. Snyder and Charles D. Snyder were in the state of California at the time said lease agreement was made, and that they neither joined therein nor knew thereof; that, prior to the time the same was made, the defendant knew of the marriage relation existing between the plaintiffs George S. and Katherine M. Snyder, and that the real estate attempted to be leased was their community property. It is alleged that the lease was void by reason of not having been executed by the wife of the community aforesaid, and by said Charles D. Snyder, and for the further reason that it was made wholly without their knowledge or authority, and was not subsequently ratified by them. It is further averred that said Katherine M. and Charles D. Snyder believed that there was no lease upon said premises for any fixed period, and that the same were

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wholly free from any incumbrance of any character, and that such belief continued with them until the defendant in this action began a suit against said George S. Snyder, by which he claimed to have purchased said real estate, and also that he was the owner thereof.

Under the issues practically as stated above, the court found substantially as follows: That the said community is the sole owner of a portion of said real estate, and is the joint owner with said Charles D. Snyder of the remainder thereof; that said George S. Snyder entered into a written contract of lease with the defendant for said real estate, by which the same was to be leased for a term of three years, but that said Katherine M. and Charles D. Snyder did not join in the execution of the lease; that, at the time the lease was made, the defendant knew of the existence of the marriage relation creating the community aforesaid; that said lands were prepared for crop during the fall of 1899 and spring of 1900, the crop harvested and threshed in the year 1900, and that settlement in relation thereto was made between the plaintiffs and defendant by the defendant delivering to one Fred Snyder, the father of George S. Snyder and Charles D. Snyder, who was acting for the plaintiffs, the share of the crop belonging to the land; that a portion of the land was, by the defendant, again seeded in wheat in the fall of 1900 and spring of 1901; that in June, 1901, the defendant commenced an action in the superior court of Adams county, claiming to have purchased a part of the land, and demanding specific performance of a contract of purchase from George S. Snyder; that, after the commencement of said action by the defendant, and acting upon the notice thereby given that the defendant was not claiming to hold said real estate as the tenant of plaintiffs, but as the equitable owner thereof under his alleged purchase, the plaintiffs then instituted

this action against defendant for possession without demand or notice. At the request of the defendant it was also found that, at all times during his possession of the premises, he fully performed all the covenants and provisions of said lease by him to be performed, and that the plaintiffs received and accepted the proceeds of the lease without objection to the possession of defendant.

As conclusions of law from the foregoing facts, the court concluded, (1) that the said lease was not valid as against the plaintiffs, and (2) that, by the commencement of said action for specific performance of said alleged contract of sale, the defendant gave notice to plaintiffs that he did not hold, or claim to hold, said real estate under and by virtue of said lease, but that he was holding that part of it described in his complaint as equitable owner; that said acts on the part of the defendant amounted to a rescission by him of said lease contract, and that, by the commencement of this action by plaintiffs, a mutual rescission of the lease was effected. Judgment was entered awarding possession to the plaintiffs, and quieting title in them as against defendant, and those claiming under him. The defendant has appealed.

Appellant contends that the first conclusion of law is erroneous in that it does not follow from the facts which were found by the court at appellant's request. It is doubtless true that the lease contract was not good under certain findings of the court, in that it was found that the wife member of the said community, and also the other joint owner of a portion of the land, did not participate in the execution of the contract. Under other findings made, and particularly those made at appellant's request, it becomes a question whether such conduct of respondents appears as will estop them to deny the lease. If the find-

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ings were confined to that subject, we might conclude that respondents were estopped, and that the court was in error as to the first conclusion of law, and in a judgment based wholly thereon. It was further found, however, that appellant began a suit against one of these respondents, by which he claimed to be the equitable owner, under a contract of purchase of a portion of this land, and sought specific performance of such contract. Appellant's position in that action was certainly notice to respondents that he did not claim to hold as tenant, but that he did claim to hold by the rights of a purchaser and equitable owner. Therefore, even if the conduct of respondents had theretofore been such as would estop them to deny the lease, yet appellant's position in his suit amounted to a declaration of rescission, on his part, of the lease contract, for he no longer claimed as tenant, but as owner. He cannot claim as a tenant while he occupies the position of one holding adversely. *White v. Brash* (Ariz.), 73 Pac. 445. Such rescission having been initiated by appellant, the present suit by respondents amounts to an acceptance thereof, and effects a mutual rescission. Appellant claims in this action only as tenant under the lease, and, with the lease rescinded, he appears to have no standing. We therefore believe the court's second conclusion of law was correct, and it sustains the judgment.

Appellant urges that the second conclusion of law is in conflict with the allegations of respondents' pleadings. We think not. It will be remembered, from the statement of the pleadings hereinbefore made, that the complaint alleges that appellant claims some interest in said land, but that the same is unfounded and without right. The answer admits a claim of interest, but sets it up as a claim of tenancy. The reply avers the facts about appellant's afore-

said suit, which amounted to a rescission of the tenancy agreement. Thus we think respondents' pleadings, in an orderly and logical manner, introduced the features which form the basis of the second conclusion of law, and that the same is within the pleadings.

Appellant contends that respondents, from the beginning of this action, proceeded against him as a tenant, and procured a writ of restitution. The allegations of the complaint are within § 5500, Bal. Code, which provides for bringing suit for possession, and to quiet title against one in possession who may not be a tenant, but who claims an interest in the property. Respondents' pleadings do not allege that appellant is a tenant. The findings, conclusions, and judgment are, therefore, within the issues, and, even though a so-called writ of restitution may have issued, we have only to determine whether the judgment of the court is within the issues, and is otherwise supported by the findings and conclusions.

Appellant suggests that respondents do not own the premises in dispute by unity of title, and that they have no common right to maintain action for possession. In 1 Pomeroy's Equity Jurisp. (2d ed.), § 245, the rule is stated that, in order to avoid multiplicity of suits, persons may unite in the same action "where a number of persons have separate and individual claims and rights of action against the same party, A, but all arise from some common cause, are governed by the same legal rule and involve similar facts, and the whole matter might be settled in a single suit brought by all these persons uniting as plaintiffs. . . ." See, also, *Osborne v. Wisconsin Cent. R. Co.*, 43 Fed. 824. Within the above rule, these respondents were not improperly united. The several rights of action arose from a common cause, are governed by the same legal

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rule, and the whole matter may therefore be settled in a single suit.

We believe, for the reasons stated, that at least the second conclusion of law follows from the findings, and it sustains the judgment. The judgment is therefore affirmed.

DUNBAR, MOUNT, and ANDERS, JJ., concur.

[No. 4764. Decided March 12, 1904.]

ADELAIDE B. McDONALD, *Appellant*, v. DENNIS McDONALD, *Respondent*.¹

APPEAL—DISMISSAL—APPEALABLE ORDER—DIVORCE—JUDGMENT—VACATION OF DECREE ON GROUND OF FRAUD WHEN APPEALABLE. An appeal from a judgment refusing to vacate a default judgment of divorce will not be dismissed on the ground that decrees of divorce are expressly excepted by statute from the provisions relating to the vacation of judgments, where it appears that the vacation of such decree is sought on the ground that it was procured by fraud.

DIVORCE—VACATION OF DECREE ON GROUND OF FRAUD—SUFFICIENCY OF EVIDENCE. Where a decree of divorce is sought to be vacated on the ground that plaintiff fraudulently stated the defendant's address at O, when he knew it to be at C, whereby plaintiff was deprived of an opportunity to appear, findings refusing to vacate the decree will not be disturbed where it appears that the parties had been separated for more than twenty years, that C was formerly the defendant's address, that O was a new town near by, that plaintiff had lived in the farther west, and the evidence failed to show that he knew O to be defendant's address.

SAME—DISCRETION OF LOWER COURT—ACTUAL NOTICE OF SUIT—NEGLECT OF DEFENDANT. The vacation of a judgment of divorce on the ground of fraud involves a matter of discretion that will not be interfered with on appeal where it appears that the defendant had actual knowledge of the pendency of the action about one month before the decree was entered and the injury might have been due to her own neglect.

¹Reported in 75 Pac. 865.

Appeal from an order of the superior court for Spokane county, Belt, J., entered December 31, 1902, dismissing plaintiff's petition for the vacation of a decree of divorce, after a trial on the merits before the court without a jury. Affirmed.

Adolph Munter, for appellant.

Wm. Sherman Dawson and Graves & Graves, for respondent.

HADLEY, J.—The respondent procured a decree of divorce against appellant. Appellant being a nonresident of the state, service of summons was made by publication. The service was regular upon its face, default was entered for want of appearance, and decree rendered. The decree was entered in February, 1902. In August of the same year this proceeding was begun for the purpose of procuring a vacation of the decree of divorce. Vacation of the decree was denied, and this appeal is from the order of denial.

Respondent moves to dismiss the appeal, and to affirm the judgment, on the ground that the statutory provisions relating to the vacation of judgments are not applicable to decrees of divorce, for the reason that such are expressly excepted by statute. This court has so held in *Metler v. Metler*, 32 Wash. 494, 73 Pac. 535. That decision was based upon the provisions of § 4880, Bal. Code. The statutory exception which is there pointed out, and the manifest and wholesome reasons for it which are there discussed, need not be repeated here. It was observed in that opinion, however, that such a decree may be lawfully vacated when entered without jurisdiction, "and perhaps where it is the result of fraud practiced on the court or the other spouse." Appellant in effect charges respondent

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with practicing such fraud, in that she avers that he knew her proper postoffice address, but that he intentionally stated in his affidavit a wrong name for her postoffice, and caused the copy of the complaint and summons to be mailed to such wrong address, whereby she claims she was deprived of actual knowledge of the pendency of the suit, and did not receive such knowledge in time to defend the action.

We appreciate the force of respondent's argument that to hold that a decree of divorce may be vacated even for such fraud may, in some instances, lead to the same unfortunate complications which are suggested in the case above cited, as furnishing the reasons for the statutory rule excepting divorce decrees from vacation. It is quite possible for a decree of divorce, regular upon its face, to be procured by the practice of such fraud, and, after the expiration of six months, as permitted by law in this state, the party thus apparently regularly divorced may marry an innocent person. Again, if, at any time within a year from the date of the decree under the statute governing vacations, the wronged party in the divorce proceedings may petition for the vacation of the decree, it follows not only that such an aforesaid innocent person may have contracted an unlawful marriage, but the legitimacy of children may also become involved. It is impossible, however, to avoid suffering for the innocent in all cases. Such is true when a bigamous marriage occurs without even a prior attempt at divorce procedure. It would seem to be violative of fundamental principles to hold that a divorce decree, fraudulently procured, may not be timely assailed by the innocent party to the proceedings. Such a one is the first sufferer to whom it would seem the law should afford first relief. The motion to dismiss the appeal is therefore denied.

Appellant by this proceeding asks the vacation of the decree of divorce, and that she be permitted to file an answer and defend in the original action. The court ordered the dismissal of the proceedings, and recited in the order that the petition is not sustained by the evidence, and that appellant has made out no cause for the vacation of the judgment. She assigns that the court erred in so holding. The ground relied upon for the vacation is that respondent knew that appellant's postoffice address was Odessa, Missouri, and made affidavit for the purposes of a publication summons that her address was Columbus, Missouri; that he mailed the copies of summons and complaint to her at the latter place, by which she was prevented from receiving them, and that she knew nothing of the pendency of the action until the latter part of January, 1902, when she understood the decree had already been entered. The decree was, however, not entered until February 28, 1902. Thus the petition shows actual knowledge of the existence of the suit for one month before the entry of the decree.

The statute, § 4877, Bal. Code, provides the manner of serving publication summons. It does not require that the defendant shall actually receive a copy of the summons and complaint in order to effect a valid service. It only requires that copies shall be mailed to the defendant's residence, if it is known to the plaintiff. When, therefore, a plaintiff sincerely believes that he knows the defendant's residence, and, with such an honest belief, mails the copies to such place, the defendant is not entitled to have the service held invalid on the mere ground that his residence is elsewhere, and that he did not receive the papers.

We are not disposed to say that the trial court should have found, from the evidence in this case, that respondent

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did not act from an honest belief in the matter of the mailing of the publication summons. The parties had been separated for about twenty-four years. Appellant continued to reside in the state of Missouri, where the two formerly resided together. Respondent meantime had resided in the farther west at Butte, Montana, and elsewhere. The evidence shows that Odessa and Columbus, Missouri, are in the same locality, and that during a portion of the time appellant has resided upon a farm not distant from either place. The farm is about five miles from Columbus, and the latter was the postoffice address for the occupants of the farm when respondent left that country. Odessa was not then in existence. While it is true that respondent had learned of its existence, and had written a letter to his son there, at appellant's request, yet we do not think it can be conclusively said from the evidence that he knew said place to be appellant's postoffice address. If he had deliberately intended to deceive in the matter, it seems more probable that he would have named some place remote from appellant, rather than one so near her.

Moreover, the evidence shows that appellant did receive actual notice of the pendency of the action. Whether she received the letter containing the summons and complaint which was addressed to her at Columbus or not, she did in any event receive notice from some source in time to have made at least an effort to defend before the judgment was entered. Her application for leave to defend was not filed for several months after the judgment. If she knew of the action in time to defend before judgment, then the pendency of the action was not, as she contends, so concealed from her by fraud that she was deprived of the opportunity of making a defense she otherwise would have made. The

trial court did not enter any specific findings, but to support its order it must have found that the weight of the testimony was with respondent in the above particulars. We are unwilling to say that it is otherwise, and, since the weight of the evidence is not clearly against the court's findings and decision, we shall not interfere therewith. *Furth v. Kraft*, 25 Wash. 590, 66 Pac. 47. Where the vacation of a judgment involves the exercise of discretion, this court has said it will not interfere therewith, unless the discretion has been abused. *Livesley v. O'Brien*, 6 Wash. 553, 34 Pac. 134; *McCord v. McCord*, 24 Wash. 529, 64 Pac. 748; *Kuhn v. Mason*, 24 Wash. 94, 64 Pac. 182.

This proceeding, it is true, is based upon alleged fraud, and if it were clear that appellant was injured as the direct result thereof, there would seem to be no room for discretion, but she should be relieved as a matter of right. Inasmuch, however, as it appears that she received actual knowledge of the pendency of the action, it became a question whether her alleged injury was due to her own neglect. It was, therefore, at least a matter of discretion with the court as to what weight should be attached to the fact of actual knowledge, under the circumstances.

The judgment is affirmed.

MOUNT, ANDERS, and DUNBAR, JJ., concur.

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Syllabus.

[No. 4702. Decided March 12, 1904.]

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ANTHONY W. BALL *et al.*, Respondents, v. HARRISON
CLOTHIER *et al.*, Appellants.¹

COURTS—JURISDICTION TO SET ASIDE ORDERS OF TERRITORIAL PROBATE COURT—JUDGMENTS—VACATION AT SUIT OF MINOR AFTER ATTAINING MAJORITY. Under Bal. Code, § 5153, authorizing the superior court to vacate any judgment for error shown by a minor within twelve months after arriving at full age, and Const., art. 27, § 10, providing that all proceedings in the territorial probate courts shall pass into the jurisdiction of the superior courts, the superior court has complete jurisdiction to review errors of the old probate court, at the suit of minors brought within twelve months after arriving at full age.

SAME—BILL OF REVIEW WITHOUT STATUTORY AUTHORITY. In such a case, the court would have jurisdiction to review such a judgment for apparent error or fraud by bill of review, whether expressly authorized by statute or not.

EXECUTORS AND ADMINISTRATORS—SALES—NECESSITY OF NOTICE TO MINOR HEIRS. An administrator's sale of real estate made under order of court is void when the minor heirs interested in the estate were not represented by a general guardian, and no guardian *ad litem* was appointed for them, and no notice given them as required by Code 1881, § 1497.

SAME—CURATIVE STATUTE—DEFECTS RELATING TO JURISDICTION. Bal. Code, § 6474, intended to cure defects and irregularities in administrators' sales, does not cure defects relating to the jurisdiction of the court over the persons of the parties in interest, owing to the failure to give notice to the minor heirs or to appoint a guardian for them, the statutory requirements therefor being mandatory.

SAME—ESTOPPEL BY PETITION TO DISCHARGE ADMINISTRATOR AND FOR DISTRIBUTION—SALE BY PREDECESSOR WHOSE ACCOUNT WAS SETTLED DURING MINORITY. Where the final account of former administrators involved an illegal sale of real estate, void for want of notice to minor heirs, and the succeeding administrator collected no money and had done nothing and filed no account during his administration, the minors upon arriving at majority are not estopped to question the validity of the sale by joining in a peti-

¹Reported in 75 Pac. 1099.

tion to discharge the last administrator and accepting a distribution of the estate then remaining, which consisted wholly of real estate, when it does not appear that they were informed of their rights or accepted the same in lieu of the whole, and there was no changed relation to the property affected.

SAME—PURCHASERS IN GOOD FAITH AT ADMINISTRATOR'S SALE—LIEN FOR AMOUNT OF PURCHASE PRICE AND TAXES—NONE FOR IMPROVEMENTS. Upon setting aside a void administrator's sale at the suit of heirs after arriving at full age, purchasers in good faith should be allowed a lien upon the property for the amount of the purchase price paid to and received by the estate, with legal interest, and also for the taxes paid by them, but not for permanent improvements, since under Bal. Code, § 5511, the value of improvements can only be set off against damages.

Appeal from a judgment of the superior court for Skagit county, Neterer, J., entered January 26, 1903, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, setting aside an administrator's sale of real estate, and denying defendants a lien for the purchase price and taxes paid. Affirmed as to the invalidity of the sale, and reversed as to the denial of defendants' lien.

Thos. Smith, Million & Houser, and Gable & Seabury, for appellants.

E. W. Taylor and Govnor Teats, for respondents.

MOUNT, J.—This appeal is prosecuted from a decree of the lower court adjudging certain probate proceedings in the estate of J. B. Ball, deceased, void, and setting aside an administrator's deed for the south half of the northeast quarter, and the north half of the southeast quarter, of section 24, township 35 north, of range 4 east. Defendants claim title to different parts of said real estate under said deed.

The facts shown by the record are substantially as follows: Jesse B. Ball died on February 4, 1889, leaving an

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estate in Skagit county and other places. His widow, Caroline Ball, survived him. Also three minor children survived him, as follows: Anthony W. Ball, then aged nine years; Zula Matilda Ball, then aged seven years; and Zenora Kate Ball, then aged five years. This latter named child died the same year. Deceased also left two grown children by a former marriage, viz., Emma Welsh and Warren T. Ball. A few days prior to his death, Mr. Ball made his will, by the terms of which he gave to Emma Welsh \$5; to Warren T. Ball, certain real estate in Vancouver, B. C.; to his widow, Caroline Ball, certain personal property; and to his three minor children, all the remainder of his property, share and share alike. He directed that all his debts be paid from the portion devised to said minors, and that "if, at the time of his death, the said minor children be not twenty-one years of age, the legacy given to them, except so much thereof as shall be necessary for their support and education, shall be retained by said executors upon trust, to be paid to them when the youngest shall have attained the age of twenty-one years, and in case of the death of one of said minor children prior to said division, the portion bequeathed to said child shall be divided among the two remaining." J. E. Smith and A. T. Marshall were named as executors, and \$300 was bequeathed to each as compensation for acting as such executors.

On February 18, 1889, the will was admitted to probate by the probate court of Skagit county, in the then territory, and the executors named in the will were appointed to carry out the provisions thereof. They were required to file a bond in the sum of \$12,000. A joint and several bond was executed and filed by said executors, which bond was, by order of the probate court, approved and entered of record. The executors thereupon qualified by taking

oath of office, and letters testamentary were issued to them, and they entered upon the discharge of their duties. The estate was thereafter appraised, showing some \$7,200 of personal property, and real estate of the value of \$5,641. But the real estate in question in this action does not appear in the appraisement. Notice to the creditors was published. On September 24, 1889, a semi-annual account of the executors was filed, showing the moneys collected to that time and the claims allowed. No order appears to have ever been made by the court upon this report.

On November 18, 1889, Mr. Marshall, one of the executors, filed with the probate court his resignation, without attempting to comply with the statute; and on the same day the said court entered an order accepting the resignation, and discharging Mr. Marshall as executor, and releasing the sureties on his official bond. Thereafter, on December 5, 1889, the other executor, Mr. Smith, filed his resignation, and published a notice thereof, as required by law, to the effect that he had filed his account as executor and resignation of his trust, and that the same would come on for hearing on January 28, 1890, at two o'clock P. M., "and all persons interested in said estate are notified to appear and show cause why the said account shall not be settled and said resignation accepted." On the 28th day of January, 1890, no one objecting, the resignation was accepted and Mr. Smith discharged as executor, and the sureties on his official bond were released. At the same time and place Caroline Ball filed her petition asking the appointment of said Smith and one Harrison Clothier as administrators of the estate. No notice of this application was given to any one, and the court, in the same order which discharged Mr. Smith as executor, appointed him, together with Mr. Clothier, as administrators *de*

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bonis non, and fixed their bonds as such administrators at \$12,000. A joint and several bond was filed and approved by the court.

Thereafter, on March 25, 1890, these administrators presented their petition, containing allegations substantially as required by statute, for the sale of the real estate now in question. On the next day the probate court issued an order directing all interested parties to appear on April 23, 1890, and show cause why the said real estate should not be sold. A copy of this order was published four times in a newspaper, but four weeks' time did not elapse between the first publication and the date of the hearing. A copy of the notice was served on the widow. No notice was given to the minors, and no guardian *ad litem* was appointed for them.

On April 23, 1890, at the time set for the hearing, no one appearing to contest the petition, an order was made directing the sale of the real estate. No time or place for the sale was fixed by the order. The administrators thereupon fixed the time, and due notice thereof as required by law was given. The sale was held on May 20, 1890, at public auction, and the property was sold to John P. Millett, one of the appellants, for \$9,100. A return of the sale was made and filed in the probate court on the 24th day of May, 1890, which was on Saturday. An order was made on the 26th day of May, 1890, confirming the sale. Thereupon an administrator's deed was executed and delivered to the purchaser. The purchase price was paid and accounted for to the estate. After Mr. Millett purchased the property, he conveyed the same to Mr. Murdock, one of the appellants, who platted a part of the land into town lots, and afterwards conveyed it to the Grand Junction Land Company, which company sold some of the lots to

the other defendants, who improved them, and are now in possession thereof.

In 1891 the administrator J. E. Smith died, and thereafter the surviving administrator, H. Clothier, administered upon the estate until September 18, 1897, when his final account was approved and he was discharged. E. C. Million was thereupon appointed administrator in his stead. Mr. Million appears to have done nothing with the estate until March 29, 1901, when, upon his petition after the minor heirs had become of age, he was discharged, and all that remained of the estate was distributed to the respondents Anthony W. Ball and Zula Matilda Ball Manning. Up to March 1, 1893, no guardian *ad litem* was ever appointed for the said minors, Anthony W. Ball and Zula Matilda Ball; they were not served with any notice of any of the petitions, or any of the proceedings in the course of administration up to that time, although during all of said times they were residents of Skagit county, were named as minor heirs, and were the sole beneficiaries of the real estate being administered upon. Subsequent to March 1, 1893, they were represented in all proceedings by a guardian *ad litem* appointed by the court.

After becoming of age and on May 10, 1901, these heirs executed a power of attorney to Warren T. Ball, authorizing him "to grant, bargain, sell, convey, mortgage, or dispose of any and all real estate within the state of Washington in which we may have any interest." The said Warren T. Ball, acting under said power of attorney, joined in the petition of Million for a discharge as administrator, and for a distribution of the estate. Mr. Million was thereupon discharged and the estate distributed to the respondents, who brought this action within one year after arriving at their majority, seeking to review the orders and errors of the probate court in direct-

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ing a sale of the land in question. They allege, in substance, that the executors were wrongfully discharged; that the administrators were not legally appointed; that no notice of any of the proceedings in the probate court was ever given to them, and no appearance was made by them; that the administrators conducted the sale fraudulently, and in all their dealings with the estate, up to and including the sale of the real estate in question and the confirmation of the sale, the administrators acted in fraud of the rights of plaintiffs; and that the probate court had no jurisdiction to make the orders complained of, all of which orders are set out in the complaint. They prayed that the order of sale, and all proceedings had thereunder, be set aside and held for naught, and that they be decreed to be the owners of the property, free from any claims of defendants by reason of their purchase and possession of the property.

After motion to make the complaint more definite and certain, and to strike certain portions thereof, and demurrers had been overruled, defendants answered separately, denying generally the allegations of the complaint and alleging, that the probate court proceedings were regular; that the administrator's sale in all respects complied with the law; that Millett, the purchaser of the land at administrator's sale, conveyed the property to William Murdock, that Murdock thereafter platted a half of it into town lots, streets, and alleys, known as Grand Junction Land Company Addition to Woolley, and that all the defendants are bona fide purchasers and claim title through Murdock; that the full purchase price at administrator's sale, viz., \$9,100, was paid and the amount accounted for in the due course of administration of the estate, and that said sum was the reasonable value

of the land at that time; that since said time defendants have made valuable improvements on the lands, and have paid the taxes thereon since 1890; that in June, 1901, after becoming of age, the plaintiffs joined in a petition to discharge the administrator acting at that time, and are therefore estopped to maintain this action; and that the sale of the property, even if irregular, is valid under the curative act of 1890. Defendants pray for a dismissal of the case, but, in the event that the sale be declared void, that they be subrogated to the rights of creditors to the extent of the purchase price of the property, together with the amount paid for taxes, assessments, and improvements. The reply denied generally all the allegations of the answer.

Upon a trial the lower court refused to find actual fraud on the part of the administrators, but found and concluded, that the appointment of Smith and Clothier as administrators of the estate was void; that the order of sale of the real estate was made without jurisdiction; that the order confirming the sale, and the administrator's deed of the property, were void; that the plaintiffs are the owners in fee simple, and entitled to the possession, and are entitled to a decree quieting their title against the defendants; and refused the relief prayed for by defendants.

Many questions are presented on this appeal. They are all argued at length in the voluminous briefs filed herein. We pass all of them by without further notice except such as we deem material and necessary to a determination of the case. Appellants' first point is that the complaint fails to state a cause of action, for the reason that there is no provision in our statute authorizing an action by a minor, after reaching his majority, to review alleged

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errors and irregularities in orders and decrees in a judicial proceeding carried on during minority. It is argued that, since there is no statutory authority for such proceeding, therefore this must be held to be an action to remove a cloud and quiet title; and, since one of the indispensable allegations in an action to quiet title is that plaintiffs are either in possession of the premises, or that the same are unoccupied and vacant, and since the complaint shows that plaintiffs are out of possession, and that defendants "are in possession of the real estate and exclude plaintiffs herein therefrom,"—the demurrer should have been sustained.

Section 5153, Bal. Code, clearly authorizes an action to vacate or modify a judgment or order of the superior court, and §§ 5156, 5157 provide the form and procedure in such actions. Section 5153 is as follows:

"The superior court in which a judgment has been rendered, or by which or the judge of which a final order has been made, shall have power, after the term (time) at which such judgment or order was made, to vacate or modify such judgment or order: . . . 5. For erroneous proceedings against a minor or person of unsound mind, when the condition of such defendant does not appear in the record nor the error in the proceedings; . . . 8. For error in a judgment shown by a minor, within twelve months after arriving at full age."

Appellants contend that this section relates exclusively to the superior court, and has no relation whatever to the proceedings in inferior courts, or to a proceeding in probate, and that proceedings to review an erroneous order or judgment must be brought in the court in which the order was entered. This statute was enacted in territorial days when the probate court was an independent inferior court. The orders complained of were made by the territorial probate court. When the constitution was

adopted, the superior court was vested with general jurisdiction such as was exercised by the territorial district courts, and also with jurisdiction in probate matters, and the probate court as an independent tribunal was abolished. It follows—if appellants' position is correct—that there is now no tribunal which has jurisdiction to review erroneous orders entered in the old probate court. This position cannot be maintained. The constitution, at § 10 of art. 27, provides that, when the superior courts are organized, all records and proceedings in probate court shall pass into the jurisdiction and possession of the superior courts, "and the said court shall proceed to final judgment or decree, order or other determination in the several matters and causes as the territorial probate court might have done if this constitution had not been adopted." Under this provision the superior court has complete jurisdiction in all matters in which the old probate court had, and certainly now the superior court, under § 5153, may vacate and set aside orders made by it in the course of its probate jurisdiction. If appellants' position that the action must be brought in the same court is correct, the superior court, being the successor of the probate court, must be held to be the same court.

Appellants further contend that, because there was no statutory provision for the old probate court to vacate and set aside its orders and judgments, none exists in the superior court for that purpose. Independent of the inherent powers of all courts to vacate and set aside their own orders and decrees for fraud, and independent of statute where the common law is in force and unmodified, a bill of review is the proper method of obtaining the vacation or annulment of an order or decree for errors apparent upon the face of the record or for fraud. 1 Black, Judgments (2d ed.), § 301.

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It follows, therefore, whether there is or is not a statute upon the subject giving the superior court jurisdiction to review judgments for apparent error or fraud, being a court of general equity jurisdiction, it has that power. If this were held to be an action to remove a cloud and quiet title, and for possession, it could be maintained under the provisions of §§ 5500-5508, Bal. Code. See, *Povak v. Lee*, 29 Wash. 108, 69 Pac. 639; *Brown v. Calloway*, ante, p. 175, 75 Pac. 630. The lower court therefore properly denied the demurrer.

Passing by many irregularities argued in the briefs relating to the appointment and qualification of the administrators, we shall consider the main question, which relates to the validity of the sale of the real estate. The court below properly refused to find any actual fraud in fact on the part of the administrators in the conduct of the sale. The petition for the sale of the land substantially complied with the statute, but there was no service, or attempt at service, of the petition or notice of the hearing upon the minor heirs, except an insufficient publication directed to all interested parties. No guardian *ad litem* was appointed for them; they had no general guardian; no appearance was made by any person for them upon the hearing as to the necessity for the sale. The court nevertheless directed the sale of the land. The sale was made on the day provided in the notice. A return thereof was subsequently made, and, without an opportunity for an objection, was confirmed and a deed issued. The purchase price was paid, and the estate had the benefit thereof.

Appellants contend that the statute relating to notice and sale was merely directory; that the proceedings are *in rem*; and, since the court had jurisdiction *in rem*

the sale was valid notwithstanding irregularities. Conceding that the probate court had jurisdiction of the real estate for the purpose of administration upon the appointment of executors or administrators, as was said in *Ackerson v. Orchard*, 7 Wash. 377, 34 Pac. 1106, 35 Pac. 605, still, before the heirs who were the beneficiaries under the will could be divested of their title, the substantial requirements of the statute must be complied with. The statute in force at the time the order was made provided that, when a petition for the sale of real estate was filed, the court should make an order directing all interested persons to appear at a time and place specified, to show cause why the order of sale should not be granted, and that this order should be personally served upon all persons interested in the estate at least ten days before the hearing, or published four successive weeks in a newspaper. Sections 1494, 1495, Code of 1881.

"If any of the devisees or heirs of the deceased are minors, and have a general guardian in the county, the copy of the order shall be served on the guardian. If they have no such guardian, the court shall, before proceeding to act on the petition, appoint some disinterested person their guardian for the sole purpose of appearing for them and taking care of their interests in the proceedings." Section 1497, Code of 1881.

This provision for the appointment of a guardian for minors was mandatory. If the court had jurisdiction over the estate, it was also necessary that it acquire jurisdiction over the persons of the minor heirs before proceeding to divest them of their title, because the statute expressly required the minor heirs to be represented. They could not waive this right, and the court could not waive it by non-compliance with the statute. *Fiske v. Kellogg*, 3 Or. 503. The case of *Bloom v. Burdick*, 1 Hill 130,

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37 Am. Dec. 299, is in point upon this question. It was there said, at page 139 :

"The surrogate undoubtedly acquired jurisdiction of the *subject matter*, on the presentation of the petition and account; but that was not enough. It was also necessary that he should acquire jurisdiction of the *persons* to be affected by the sale. It is a cardinal principle in the administration of justice, that no man can be condemned or divested of his right, until he has had the opportunity of being heard. He must, either by serving process, publishing notice, appointing a guardian, or in some other way, be brought into court; and if judgment is rendered against him before that is done, the proceeding will be as utterly void as though the court had undertaken to act where the subject matter was not within its cognizance."

When the statute required the appearance of the minor heirs by guardian *ad litem* before the court should make the order of sale, it was necessary for such appearance, even if the proceedings were *in rem*. The order of sale was therefore without the authority of law, and was void as to the minor heirs. *Wallace v. Grant*, 27 Wash. 130, 67 Pac. 578.

Appellants contend that, under the curative act of 1890, § 6474, Bal. Code, the heirs were not entitled to avoid the sale in this case. That section is as follows:

"In case of an action relating to any estate sold by an executor, administrator or guardian, in which an heir or person claiming under the deceased, or in which the ward or any person claiming under him, shall contest the validity of the sale, it shall not be voided on account of any irregularity in the proceedings; Provided, It appears,— (1) That the executor, administrator, or guardian was ordered to make the sale by the probate or superior court having jurisdiction of the estate; (2) That he gave a bond which was approved by the probate or superior judge, in case a bond was required upon granting the order; (3)

That he gave notice of the time and place of sale, as in the order and by law prescribed; and (4) That the premises were sold accordingly, by public auction, and the sale confirmed by the court, and that they are held by one who purchased them in good faith."

It would appear from this section that, if all the requirements named were complied with, other *irregularities* would be insufficient to avoid the sale, and, if all the requirements named were not fulfilled, then the sale may be avoided. In *Wallace v. Grant, supra*, we held that, where a petition to mortgage or sell real estate was not verified, and failed to show that the personal estate was exhausted, or that the same was insufficient to pay the debts of the administration, the probate court did not acquire jurisdiction to make an order of sale or mortgage. In *Dormitzer v. German Savings & Loan Society*, 23 Wash. 132, at page 192, 62 Pac. 862, we held that this section related only to irregularities, and did not go to the jurisdiction of the court. And in *Hazleton v. Bogardus*, 8 Wash. 102, 35 Pac. 602, where the petition, in describing the lands to be sold, was so defective that the lands could not be located, it was held that this section did not cure the defect. In *Ackerson v. Orchard, supra*, where the court had jurisdiction, and the proper notice was given, and all the provisions of § 6474, *supra*, were complied with, it was held that other irregularities did not avoid the sale. As we have seen above, the probate court had no jurisdiction to order the sale by reason of the absence of notice to the minor heirs and failure to appoint a guardian *ad litem* for them, and therefore, under the authorities above named, the curative act does not apply, and the minors may therefore avoid the sale.

Appellants also contend that, because the plaintiffs, after arriving at their majority, joined in a petition for

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the discharge of E. C. Million as administrator, and for a distribution of the estate, and accepted the estate remaining, they are now estopped to question the validity of the sale. A number of authorities are cited to the effect that the settlement by a final account, distribution, and discharge of the administrator is an adjudication of all questions which were or should have been involved, and so long as such final settlement stands, interested parties are bound by it. This is no doubt the correct and just rule, and, as to all questions which were or should have been adjudicated at that time, these respondents are bound, but the final account of E. C. Million is not shown to include the sale of the land in question, or the proceeds thereof. In fact, we are unable to find any final account filed or acted upon at the final discharge of Mr. Million. The record shows that nothing had been done by him during his administration of the estate. He was simply appointed, held the office for about three years without collecting or paying out any money, was discharged, and the property remaining, which consisted wholly of real estate, was distributed to the respondents.

The final account of the former administrators, which involved the sale and the proceeds thereof, had long since, and during the minority of the respondents, been finally settled, so far as the administration was concerned. It was therefore not necessary for Mr. Million to include in his final account matters which had already been settled. Nor was it necessary or proper for the court, upon the final discharge of Mr. Million, upon its own motion to open up matters which had already been determined, and which were not then called to its attention, and this was not attempted to be done. Furthermore, it is not shown that the respondents, at the time they accepted a part

of the estate, were informed or knew of their rights, or intended to accept this part in lieu of the whole. Nor is there any showing of any deception by the respondents, or changed relation to the property by appellants. The principles of estoppel therefore do not apply. *Schnell v. Chicago*, 38 Ill. 382, 87 Am. Dec. 304; *Dorlarque v. Cress*, 71 Ill. 380.

Appellants contend that, in case the title to the real estate is avoided in this action, they should each be awarded their proportionate share of the original purchase price paid to the estate, and the taxes paid since sale, and the value of the improvements placed thereon. This relief was denied them by the court below. We think, in justice and equity, the relief prayed in that regard, except for permanent improvements, should have been allowed. The court, in *Sengfelder v. Hill*, 21 Wash. 371, 58 Pac. 250, in considering the question of permanent improvements on real estate, held that, under the provisions of § 5511, Bal. Code, where defendants held under color of title, in good faith, as these appellants do, the value of such improvements could only be set off as against damages, and no recovery could be had therefor. Hence appellants are not entitled to recover for the items of improvements. The land was purchased from the estate in good faith by the appellants and their predecessors in interest, and the purchase price thereof was paid into the estate, and used in the administration thereof, and these respondents received the benefit. They should not, under such circumstances, be permitted to avoid the sale without repaying the purchase price, and, upon the principles announced in *Packwood v. Briggs*, 25 Wash. 530, 65 Pac. 846, and subsequent cases, appellants should have a lien upon the realty for the items paid for taxes, for the rea-

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son that the taxes paid were necessary to protect the real estate from seizure and sale by the state, and these payments inured to the benefit of the respondents.

The judgment appealed from is therefore modified in respect of the purchase price paid for the lands at administrator's sale, which was \$9,100, and in respect of taxes paid by appellants since that time. The cause is remanded with instructions to the lower court to determine the respective amounts due each of the appellants, with interest at the legal rate, and to make the amounts thereof preferred claims against the said estate; appellants to recover their costs.

HADLEY, ANDERS, and DUNBAR, JJ., concur.

[No. 4460. Decided March 14, 1904.]

J. F. MALLOY, *Respondent*, v. J. B. BENWAY, *Appellant*.¹

EJECTMENT—COMPLAINT—SUFFICIENCY—HUSBAND AND WIFE—CONVEYANCE BETWEEN—PRESUMPTION OF GOOD FAITH UNTIL QUESTIONED. A complaint for the recovery of the possession of land, plaintiff's title to which is based upon a conveyance between a husband and wife, need not allege that such a conveyance was made in good faith under the statute casting the burden of proof upon the plaintiff, since such is the presumption until the good faith of the transaction is called in question and plaintiff need not anticipate such an issue, and since the pleading is to be liberally construed.

SAME—DEED—DELIVERY—EVIDENCE—SUFFICIENCY—TITLE OF PLAINTIFF—FAILURE OF PROOF AS TO DELIVERY OF PAPERS—NONSUIT. In an action for the recovery of possession of premises in which the plaintiff claimed through a written assignment of a lease from B, there is a total failure of proof as to plaintiff's title and a nonsuit should be granted, where it appears that the assignment was made in consideration of \$350, that only \$50 was paid to one S, an attorney acting as agent between the parties,

¹Reported in 75 Pac. 869.

that the balance was to be paid upon the plaintiff's obtaining possession, and that the lease and assignment were not delivered to the plaintiff, but were held by S until the balance of the purchase price was paid, since there is a complete failure of proof as to the delivery of the papers constituting plaintiff's title.

Appeal from a judgment of the superior court for Spokane county, Richardson, J., entered April 7, 1902, upon the verdict of a jury rendered in favor of the plaintiff, after a trial on the merits, in an action for the recovery of real estate. Reversed.

John A. Peacock, for appellant.

Scott & Rosslow, for respondent.

PER CURIAM.—This is an action brought by plaintiff, J. F. Malloy, against J. B. Benway, defendant, in the superior court of Spokane county, for the recovery of the possession of certain real estate, described as lot eight, in block sixty-eight, in school section sixteen, township twenty-five north, of range forty-three east, W. M., in said county, and the improvements thereon, including a five room frame dwelling house; also, damages for wrongfully withholding possession of such property from plaintiff, and for other relief. The cause was tried before the court and a jury. A verdict was rendered in favor of plaintiff, awarding possession of the property to him, and ten dollars damages. Defendant made and filed his motion for a new trial, which was denied by the trial court. Judgment was entered on the verdict in favor of plaintiff. and defendant appeals to this court.

The complaint alleges, that the state of Washington is, and was at the times therein mentioned, the owner of the above described land; that on June 1, 1897, the state leased, in writing, unto J. B. Benway, this tract of land for the period of five years; "that during the term

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of lease, to wit: on or about February 2, 1901, said J. B. Benway conveyed, transferred, and assigned in writing, said lease to one Maggie Benway, his wife, together with all his interest, community or otherwise therein; and, on or about the same time, conveyed in writing all that certain five roomed frame dwelling house, together with all other improvements on said lot eight, to said Maggie Benway, conveying said premises, and all his community interest therein, to said Maggie Benway, to have as her sole and separate property; that afterwards, to wit: on or about the 9th day of December, 1901, said Maggie Benway sold, transferred, and conveyed in writing all her right, title, and interest in said lot and improvements thereon to plaintiff herein." The complaint further alleges that, by reason of the foregoing premises, plaintiff is the owner of all said property, and is entitled to the possession thereof; that plaintiff (respondent) duly demanded possession of said property of appellant, which was refused.

Appellant, Benway, demurred to the complaint. The demurrer was overruled and exception taken. An answer was then filed in the cause. In the first paragraph thereof, occurs the following averment: "That defendant denies each and every allegation, matter, and thing in plaintiff's complaint set forth and alleged, not herein-after admitted." The answer then in express language admits the allegations of paragraphs 1 and 2 of the complaint, pertaining to the ownership by the state of this real estate and the lease thereof to appellant. This answer also sets up an affirmative defense, alleging, in substance, that the land and property in question was and is the community holding of appellant J. B. Benway and his wife Maggie Benway; that the purported transfers thereof

were without consideration, and were fraudulently obtained by the wife from the husband; that the instruments purporting to convey such property were placed in the hands of one Scott, in escrow, not to be delivered by him to Mrs. Benway until appellant should so direct; that appellant has been at all times and is in possession of such property, occupying the same with his children as a home, and that any transfer taken by respondent from said Maggie Benway is and was taken with full knowledge and notice of appellant's rights in the premises. This defense further alleges, that respondent never gave any consideration for said property; that he is not the real party in interest, but is prosecuting said action for the benefit of Maggie Benway. Respondent by his reply denies each and all the allegations of new matter set up in the above answer, except that J. B. and Maggie Benway are husband and wife.

Appellant's first and second assignments of error practically present the same question: Does the complaint state facts sufficient to constitute a cause of action? Appellant's counsel argues that it was necessary to allege in the complaint that the written instruments, described therein as having passed between J. B. Benway and his wife, under which respondent claims title and right of possession to the property in question, were executed in good faith. Bal. Code, § 4580, is cited in support of such contention. This section provides:

"In every case where any question arises as to the good faith of any transaction between husband and wife, whether a transaction between them directly or by intervention of third person or persons, the burden of proof shall be upon the party asserting the good faith."

Applying the provisions of this section to the allegations in the above complaint, it would seem that, until some

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question was raised as to the good faith of the transfers between the two spouses, it was unnecessary for the respondent to take the initiative and allege good faith with reference to the transaction; that respondent was not required to anticipate an issue which might never be tendered. Moreover, we think that it is a safe general rule to assume that parties in their dealings are actuated by proper motives; that, therefore, good faith with regard to such dealings will be presumed until the contrary is alleged or made to appear. The complaint, therefore, is not objectionable because it fails to allege that the transfers or instruments that passed between Mr. and Mrs. Benway were made in good faith. Moreover we think the complaint sufficient in other respects. General averments are always controlled by the specific allegations of fact in a pleading. Phillips, Code Plead., § 346; *State v. Wenzel*, 77 Ind. 428; *State ex rel. MacKenzie v. Casteel*, 110 Ind. 187.

It is also a general rule under the code of procedure that the allegations of a pleading are to be liberally construed with a view to substantial justice between the parties. "Under favor of this rule, whatever is necessarily implied in, or is reasonably to be inferred from, an allegation, is to be taken as if directly averred." Phillips, Code Plead., § 352, and citations. In view of these liberal rules of interpretation, we think that the allegations of the complaint show sufficiently, as a matter of pleading, that the right of possession in and to the property, which is the subject of this action, became vested in respondent.

It is next contended that the court below erred in denying appellant's motion for a nonsuit at the trial. This seems to us to be the pivotal question in the present controversy. We shall assume, for the purposes of this ap-

peal, without intending to decide the question, that the testimony in respondent's behalf at the trial showed that whatever title, estate, and interest appellant had in the above realty and improvements vested in his wife Maggie Benway; that the same became her sole and separate property by virtue of the two written instruments dated February 2, 1901, as stated in the complaint. Respondent at the trial attempted to make title, and show right of possession, to this land and property under a written assignment of the above lease, the consideration named therein being ten dollars, and a bill of sale of the house and improvements for the consideration of three hundred and forty dollars. These instruments are dated December 9, 1901, and are signed and acknowledged by Maggie Benway. The respondent is named in the assignment of the lease as assignee, and in the bill of sale, as vendee. The two instruments comprise all the property described in the complaint, and were introduced and received in evidence over appellant's objections, and are designated in the record as plaintiff's exhibits "A" & "B". On cross-examination respondent testified in answer to questions propounded to him as follows:

"Q. Mr. Malloy, under what circumstances did you purchase this property? A. Why the same as any other. Q. What did you pay for it? Mr. Scott: Objection; irrelevant, incompetent, and immaterial, not proper cross-examination. Overruled. Exception. A. \$350. Q. Who did you pay that to? A. I paid \$50 to Mr. Scott. Q. Owe the balance? A. I am to pay Mr. Scott when I get possession. Q. Mr. Scott has agreed to get possession before being paid any more money? A. Yes sir. Q. Did you have any conversation with Mrs. Benway? A. I didn't know her at all; had never seen her. . . . Q. Now Mr. Malloy, isn't it a fact that this property has not as yet, as a matter of fact, been sold to you? A. Well I say it has, I paid my fifty dollars, and expect to

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pay the rest, and I expect to get it. Q. Otherwise it would belong to who? A. To Mrs. Benway, but I expect to get that property."

It further appears from the testimony in respondent's behalf that written notice was duly served upon appellant to surrender possession of this property to respondent, in the month of December, 1901, after the date of the above instruments under which respondent claims title and right of possession in and to this property, and that appellant refused to comply with such request.

Mr. A. W. D. Scott, one of respondent's attorneys in this cause, who represented Mrs. Benway in this transaction, testified in his direct examination in the following manner:

"Q. I will ask you to examine plaintiff's exhibits 'A' & 'B', and ask you to state whether you know anything with regard to the delivery of these deeds or instruments to Mr. Malloy, the plaintiff? A. These have not been delivered to Mr. Malloy, but have been held by me for the back payment that has not yet been made, as I was acting as agent between Mrs. Benway and Mr. Malloy."

This was substantially all the evidence produced at the trial bearing on the questions of delivery of these instruments, under which the respondent claims title and right of possession of this realty, together with the improvements thereon, and which constituted respondent's interest therein at the time of the commencement of the present action.

We think that the denial contained in appellant's answer puts in issue the material allegations of the complaint pertaining to the title and right of possession of this property. See *Tullis v. Shannon*, 3 Wash. 716, 29 Pac. 449. As a general principle of law, the possession of a completed written instrument such as a deed, bill of sale, or an assignment by a grantee, vendee, or assignee, is

prima facie evidence of the delivery of such instrument. Such presumption may, however, be overcome by competent proof. Here we have positive testimony in respondent's behalf that these instruments, exhibits "A" & "B", were not delivered to respondent. The legal effect of this testimony above noted was that the title and right of possession to this property should not vest in respondent until the payment of the balance of the purchase money therefor. Under the allegations of the complaint, as a part of respondent's case, it was just as necessary for him to show a proper delivery of these instruments as that they were signed by Mrs. Benway. The proof in that respect seems to be wholly wanting. The record shows that this action was begun at or about January 18, 1902, and was not tried in the superior court till March 13, 1902. We think that neither the trial court nor the jury was warranted in assuming, in the light of the testimony, that simply because respondent or his attorneys introduced these instruments in evidence at the time of the trial, it therefore logically followed that they had been delivered to respondent, prior to the bringing of this action. The respondent must recover, if at all, on the strength of his own title in and to this property at the time of the commencement of this action, and not on the weakness of appellant's title thereto. *Humphries v. Sorenson*, 33 Wash. 563, 74 Pac. 690. Section 5508, Bal. Code, provides with reference to actions similar to the case at bar, as follows:

"The plaintiff in such action shall set forth in his complaint the nature of his estate, claim, or title to the property, and the defendant may set up a legal or equitable defense to plaintiff's claims; and the superior title, whether legal or equitable, shall prevail. The property shall be described with such certainty as to enable the possession thereof to be delivered if a recovery be had."

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The respondent has failed in his proofs to bring this case within the purview of this section. His right to recover in the present action, under the allegations of his complaint, is based upon, and is to be measured by, the terms and conditions of exhibits "A" & "B", his evidences of title or right of possession to the above premises. He failed to prove at the trial that they were delivered to him. Besides, whatever evidence there was, as to that feature of the transaction, tended to show that title and right of possession to this property remained in Mrs. Benway till the payment of the balance of the purchase money. This is not a case of variance between the pleadings and the evidence, but one of failure of proof on the issues tendered by the complaint as to the complete execution of these written instruments; on which issues respondent had the affirmative at the trial, and failed to sustain his contentions in that behalf. We are, therefore, of the opinion that the trial court erred in denying appellant's motion for a nonsuit. Having reached this conclusion, it is unnecessary for us to consider the other assignments of error.

The judgment of the superior court is reversed, and the case remanded, with directions to dismiss the action at respondent's cost.

[No. 4826. Decided March 14, 1904.]

WILLIAM A. CLARK *et al.*, Appellants, v. CHARLES S. ELTINGE *et al.*, Respondents.¹

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85	377
86	379

COMMUNITY PROPERTY—LIABILITY FOR HUSBAND'S DEBT CONTRACTED IN MONTANA—PLEADING WIFE'S EXEMPTION—PRESUMPTIONS. The presumption that a debt contracted by a husband in Montana is a community debt is not overcome by the wife's pleading a Montana statute providing that the wife's separate property is

¹Reported in 75 Pac. 866.

exempt from the husband's debts, under certain conditions, without further setting up the necessary conditions to entitle her to the exemption from the liability.

APPEAL—DECISION—LAW OF THE CASE—HUSBAND AND WIFE—ACTION ON NOTE MADE IN MONTANA—DEFENSES—FORECLOSURE OF MORTGAGE BEFORE RECOVERY ON NOTE. After the appellate court has held on a former appeal that the plaintiff in an action on a promissory note made in Montana need not show that a mortgage securing the same has been foreclosed (the Montana statute providing that there shall be no recovery on the note until after foreclosure), but that such fact and the laws of Montana relating thereto are matters of defense, it becomes the law of the case and it is error to grant a nonsuit for the failure of the plaintiff to prove the foreclosure of the mortgage.

Appeal from a judgment of the superior court for Spokane county, Belt, J., entered April 27, 1903, upon the verdict of a jury rendered in favor of the defendants by direction of the court, in an action upon a promissory note. Reversed.

B. C. Mosby, for appellants.

W. T. Stoll and *B. B. Adams*, for respondents.

HADLEY, J.—This cause was once before appealed to this court. For the decision upon that appeal, see *Clark v. Eltinge*, 29 Wash. 215, 69 Pac. 736. Reference is hereby made to that opinion for a statement of the case without the necessity of repetition here. The judgment was reversed, and the cause remanded for a new trial.

Upon the return of the cause to the superior court, the defendants filed amended answers in which they pleaded certain laws of Montana, which it is claimed provide that an action shall not be brought in that state upon a promissory note, when the same is secured by mortgage, until the mortgage has been foreclosed and the value of the security applied upon the note. Certain other Montana statutes were also pleaded as defining the property relations of hus-

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band and wife in that state, and which it is claimed determine that the wife sued in this action is not liable. The amended answers also allege that the note sued upon is secured by mortgage upon real estate in Silver Bow county, Montana, and that the mortgage has never been foreclosed. The reply admits the allegations as to the Montana laws, and also the allegation as to the execution of the mortgage, but denies the averment that the mortgage has not been foreclosed.

Under the issues, amended as aforesaid, the cause again came on for trial before the court and a jury. The plaintiffs made proof as to the ownership of the note, the balance claimed to be due, and as to the marriage relation of the defendants. The note was then introduced in evidence, and the plaintiffs rested. The defendant Josephine D. Eltinge then moved for an instructed verdict in her favor, on the ground that her liability must be measured by the laws of Montana, and that under those laws, as pleaded in her answer and admitted by the reply, she is not liable. The court sustained the motion. The defendant Charles S. Eltinge thereupon moved for a directed verdict in his favor, on the ground that the evidence was insufficient to justify a verdict against him. This motion was also granted, the cause was taken from the jury, and judgment entered in favor of each defendant that plaintiffs shall take nothing by the action, and that defendants shall recover costs. The plaintiffs have appealed.

It is first assigned that the court erred in sustaining the motion to take the case from the jury as to respondent Josephine D. Eltinge. It is urged by said respondent that, as she did not sign the note, she is not liable under the laws of Montana, the place where the contract was made. In the former opinion in this case we said that Mrs. Eltinge is a proper party for the purpose of having it determined

whether the judgment, should one be obtained, can be executed as a judgment for a community debt, or whether it can be executed only as a judgment for the separate debt of the husband. Under the doctrine established in this state, if the debt is a community obligation, it may be enforced against both the real and personal property of the community, and, if it is the separate debt of the husband, it may be enforced against the community personal property. The wife is, therefore, a proper party, in order that the relations of her property interests to the debt may be determined in the action. She now admits that she is a proper party for that purpose, but urges that, under the Montana law, her property interests can in no event become liable in this action.

It must, however, be presumed from the start that certain of her property interests are liable, for such is the presumption under our community property law. If she would remove that presumption, she must plead and prove a Montana law, or other necessary facts, which show that she is not liable. She has pleaded a Montana statute, and it is admitted as pleaded. In order, however, to remove the presumption of any liability against her, the Montana law must, upon its face and of itself, show want of any liability in the premises, or she must prove the necessary facts which bring her within nonliability. The statute pleaded, being admitted, stands of course as proved. Does it, of itself and without further proof, show that Mrs. Eltinge's property interests are free from liability in this cause? It does disclose that in Montana the system of community ownership of property does not exist, but it, at the same time, shows certain liabilities arising from the existence of the marriage relation. A section of what is alleged to be a part of the Montana Civil Code is pleaded as follows:

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"Sec. 227. The separate property of the wife shall be exempt from all debts and liabilities of the husband, unless for necessary articles procured for the use and benefit of herself and her children under the age of 18 years, but such exemption shall extend only to such property of such wife as shall be mentioned in an inventory thereof, as provided in Secs. 221 and 222. And in no case shall any of the separate property of the wife be liable for the debts of the husband, unless such property is in the sole and exclusive possession of the husband and then only to such persons as deal with the husband in good faith on the credit of such property, without knowledge or notice that the property belongs to the wife. But the separate property of the wife is liable for her own debts, contracted before or after marriage."

Sections 221 and 222, referred to in the above quoted section, are also set out in the pleading as follows:

"Sec. 221. A full and complete inventory of the separate personal property of the wife may be made out and signed by her, acknowledged or proved in the same manner required by law for the acknowledgment or proof of a grant of real property by an unmarried woman, and recorded in the office of the county clerk of the county in which the parties reside."

"Sec. 222. The filing of an inventory in the clerk's office is notice and prima facie evidence of the title of the wife."

An inspection of the above sections shows that said respondents' pleading sets up laws which recognize her liability for the husband's debt under certain conditions. The evidence shows that the money borrowed upon the note in suit was used to buy a lot and build a house thereon, and that respondents occupied it as their home. Whether that fact brings this debt within the classification of the husband's liabilities for which the wife's separate property is not exempt, we apprehend must depend upon the construction placed upon the statute by the courts of Montana,

and resort must be had to such construction, as a fact, to determine the force of the statute when applied to the facts here.

It will be observed that section 227, *supra*, provides that the wife's separate property shall not be exempt for the husband's liabilities for necessary articles, procured for the use and benefit of herself and her children. Whether a home shall be classified as such a necessary thing, not being clear by the statute itself, may possibly be made clear by evidence of statutory construction in a similar case in Montana. It will also be observed that, under the statute, the failure of the wife to file an inventory renders her personal property liable for the husband's debts. The presumption with which we started—that a liability of the wife exists in this case—is therefore not removed by the mere pleading and admission of the statute. Proof of the necessary conditions which exempt her from liability under that statute must be made. We think it properly devolves upon the respondent, who seeks to avoid the presumption against her, to make that proof. We therefore believe the court erred in granting the motion to take the case from the jury as to said respondent.

It is next assigned that the court erred in sustaining the challenge to the sufficiency of the evidence as to respondent Charles S. Eltinge, and in withdrawing the case from the jury as to him. The theory of the court seems to have been that, because the complaint contains allegations that the note was secured by mortgage, and that the same had been foreclosed, it therefore devolved upon the plaintiffs to introduce proof that the mortgage had been foreclosed, and the proceeds of the security applied upon the note. The action was a simple one upon a promissory note, it being alleged that a certain amount had been paid, and judgment

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is demanded for the balance. Such an action is competent under our law, regardless of the fact that a mortgage may secure the note. The allegations with regard to the mortgage and its foreclosure are clearly immaterial and surplusage. We said in this case before:

"While the complaint contains much immaterial matter, it is plain that the purpose and the sole purpose of the allegations concerning the mortgage is to show the source of certain of the credits given upon the note."

It was further said in that opinion, at page 222:

"The action itself was a simple one. In order to put the respondents upon the defense, it was enough for the appellants to allege and prove the making and delivery of the note, their ownership of it, the fact that the respondents were husband and wife, and that the debt was a community debt under the laws of this state. Whether the note had been paid, in whole or in part, or whether there were other legal reasons why the appellants could not recover, were matters of defense, which the respondents must allege and prove in order to avail themselves of them. It did not devolve upon the appellants to negative such defenses in advance of their assertion."

We think the above language makes it clear, as the law of this case, that, when appellants had introduced their evidence, the nature of which conforms to the suggestions of this court, they were entitled to go to the jury. It was plainly stated that, when such proof was made, then, if there were other legal reasons why recovery could not be had, they were matters of defense which respondents must allege and prove.

Respondents are making the defense that resort must be had to the law of Montana to determine whether appellants may recover in this action. As a part of the defense, they claim that, under that law, the mortgage must have been foreclosed and the proceeds of the security applied upon

the debt, before this action can be maintained. They allege that this has not been done. It is their duty to prove it, if they wish to avail themselves of it. As we said on the other appeal, they cannot require appellants to negative their defenses in advance of their assertion. The record discloses that, when appellants' counsel learned that it was the court's view that because the complaint alleged foreclosure of the mortgage it became the duty of the appellants to prove that fact, he sought leave of the court to open up the case, and make the proof upon that subject, which he stated was at hand. The request was, however, denied. Granting that the court, in its discretion, might have declined to open up the case, yet we think it had previously erred in holding that appellants should have made further proof before their case could go to the jury. Discussion of authorities seems unnecessary, since the law of the case in the above particular was once declared by this court, and is therefore binding upon all concerned. *Wilkes v. Davies*, 8 Wash. 112, 35 Pac. 611, 23 L. R. A. 103.

For the foregoing reasons, we think the court erred in refusing to grant a new trial. The judgment is reversed, and the cause remanded, with instructions to the lower court to grant a new trial.

FULLERTON, C. J., and MOUNT, ANDERS, and DUNBAR, JJ., concur.

[No. 4715. Decided March 14, 1904.]

CHARLES P. WELEVER *et al.*, *Appellants*, v. ADVANCE
SHINGLE COMPANY, *Respondent*.¹

EVIDENCE—VARYING WRITING BY PAROL—CONTEMPORANEOUS ORAL AGREEMENT—ORAL SALE OF TIMBER. Where a written bill of sale of a shingle mill makes no mention of standing timber, evidence of an oral sale of such timber made at the same time as the purchase of the mill does not contradict or vary the terms of the writing and is admissible, since the sale of the timber is not embraced in the writing.

SALES—OF STANDING TIMBER BY PAROL—LICENSE TO CUT. The parol sale of standing timber, when acted upon, amounts to a license to cut and remove the timber, which thereupon becomes the property of the licensee.

NEW TRIAL—INSUFFICIENCY OF THE EVIDENCE—DISCRETION OF LOWER COURT. Insufficiency of the evidence to sustain the verdict is ground for a new trial although there was some evidence to sustain the verdict, and the granting of a new trial upon conflicting evidence will not be disturbed except for abuse of discretion.

Appeal from an order of the superior court for Snohomish county, Denney, J., entered January 9, 1903, granting defendants' motion for a new trial, after the verdict of a jury rendered in favor of the plaintiff for \$600 damages for cutting timber. Affirmed.

A. M. Abel and *McMurchie & Bundy*, for appellants.

G. M. Emory and *McGuinness & Miller*, for respondent.

HADLEY, J.—Appellants brought this action to recover damages from respondent for alleged wrongful cutting of timber upon appellants' lands, and for the value thereof. Respondent answered, setting up facts under which it claims to have been the owner of the timber, with license to remove it from the land. A trial was had before a jury,

¹Reported in 75 Pac. 863.

and a verdict was returned in favor of appellants for the sum of \$600. Respondent moved for a new trial and the same was granted on the ground, as stated in the court's order, that the evidence was insufficient to justify the verdict, and that it is against the law. This appeal is from said order, and it is assigned that the court erred in setting aside the verdict and in granting a new trial.

For a time prior to December 3, 1900, appellant Charles P. Welever owned, jointly with others, a certain shingle mill, which was located upon the tract of land whereon stood this timber which is in dispute. On that date he executed a written bill of sale to M. J. McGuinness for all of his interest in and to the shingle mill, including, by special mention, the machinery, dry kiln, and all buildings connected with the mill. McGuinness was the transferee in trust, only, for certain others, who were the real purchasers, and who caused the transfer to be so made and held until they could incorporate the respondent company. Said purchasers afterwards became incorporators of the respondent company, and the said interest was then transferred to it. In said bill of sale no mention is made of any transfer of timber, but it is claimed by respondent, and there is considerable evidence to the effect, that said appellant took the mill purchasers over the land, showed them the timber, and urged, as an inducement for the purchase of the mill, that the timber would be transferred to the purchasers. There is also evidence, that said appellant represented to the purchasers that he and his associates were the owners of the timber; that it was agreed throughout the negotiations that the timber should pass to the purchasers, and that, but for such representations and agreement, the purchasers would not have bought the mill. There is also evidence that, when the purchase was made, the purchasers assumed and agreed to pay certain obligations of Welever and his asso-

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ciates, among which was a balance due from the latter to their own vendor for the purchase price of this timber, and that respondent did pay said sum to the former owner of the timber on account of said obligation of Welever and his associates.

Appellants urge that, inasmuch as no mention is made of the timber in the written bill of sale, it was therefore improper to admit any testimony bearing upon this subject, for the reason that its effect was to contradict and vary the terms of the written instrument. If appellants' position is correct, it follows that the court should not have considered any of that evidence in passing upon the motion for a new trial. We believe the evidence admitted in this case does not come within the classification of parol evidence which contradicts or varies the terms of a written instrument. It is true, the bill of sale is complete in itself, but that fact is not inconsistent with the parties having entered into a verbal agreement, at the time of the execution of the writing, touching a subject not embraced in the writing.

"Again, the parties to a written agreement which is complete in itself may at the time of its execution or previously have entered into a collateral parol agreement concerning some matter on which the instrument is silent, and the rule does not preclude the proof of such collateral agreement provided no attempt is made to vary or contradict the writing." 21 Am. & Eng. Enc. Law (2d ed.), 1904.

The decisions of many states are cited in support of the above.

"The written contract (exhibit A) does not refer to the matter of the sale of the old machine and the evidence as to the rescission of that sale falls within the familiar rule that parol evidence is admissible to prove an oral agreement relating to a different subject matter from that covered by the written contract, although both contracts may be parts of the same transaction." *Lynch v. Curfman*, 65 Minn. 170, 174, 68 N. W. 5.

Appellants, however, make the further contention that, granting the contract to have been as respondent insists, it was nevertheless void, under the statute of frauds, in so far as there was an attempt by parol to sell the timber. It is conceded that there is conflict of authority upon this subject, it being held in some states that a sale of growing trees is not a sale of an interest in lands, and that it may be made by parol, while a contrary doctrine prevails in other states. However, even where it is held that a sale of growing trees is a sale of an interest in lands, which must be transferred by deed, it is also held that an attempted sale by parol, when acted upon, amounts to a license to cut and remove the timber, and that, when so cut, it becomes the property of the licensee. *Pierrepoint v. Barnard*, 6 N. Y. 279; *White v. King*, 87 Mich. 107, 49 N. W. 518; *Lillie v. Dunbar*, 62 Wis. 198, 22 N. W. 467; 1 Washburn, Real Property (5th ed.), 15.

The evidence admitted in the case at bar was not only to the effect that the parol license existed, but also that it was executed by the cutting and removal of the timber. It was therefore competent evidence, under the above rule, and if true, then, under the representations, appellants are now estopped to claim as against the purchasers, and respondent as successor in interest, that the license was not given, or that they were not, at the time, actual owners of the timber, with full power to sell it.

For the foregoing reasons, we shall consider the criticized evidence for the purposes for which it was introduced. Inasmuch as there was conflict in the evidence, it becomes a question to what extent this court will review the action of the trial court in granting a new trial. Appellants urge that it is the province of the jury to pass upon the evidence, and that it is error to grant a new trial for insufficiency thereof, when there is any evidence to support the verdict.

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If the evidence heretofore mentioned was true, then the verdict was wrong, and the new trial should have been granted. "Insufficiency of the evidence to justify the verdict" is, by statute, expressly made a ground for new trial. § 5071, Bal. Code. The statute does not say that such ground shall not be considered when there may be some evidence in support of the verdict. Evidently the exercise of discretion is lodged with the trial court, who hears and observes the witnesses, and who is therefore able, from much experience, to estimate the value of the testimony. It would divest the trial court of the right to exercise what is often a wholesome discretion, if it should be held that a new trial should not be granted for insufficiency of evidence when there is any evidence whatever to support the verdict. The appellate court should, therefore, not review the discretion of the trial court in such a case further than to determine whether the proper discretion in the premises has been abused. *Trumbull v. Jackman*, 9 Wash. 524, 37 Pac. 680; *Rotting v. Cleman*, 12 Wash. 615, 41 Pac. 907; *Corbitt v. Harrington*, 14 Wash. 197, 44 Pac. 132; *McBroom etc. Co. v. Gandy*, 18 Wash. 79, 50 Pac. 572; *O'Rourke v. Jones*, 22 Wash. 629, 61 Pac. 709; *Latimer v. Black*, 24 Wash. 231, 64 Pac. 176; *Hughes v. Dexter Horton Co.*, 26 Wash. 110, 66 Pac. 109.

In several of the above cases it is held that, when there is a substantial conflict in the evidence, this court will not hold that the discretion of the trial court is abused by the granting of a new trial. Within the rule above discussed, there is nothing in this record to show that the lower court abused its discretion in granting the new trial.

The judgment is therefore affirmed.

FULLERTON, C. J., and ANDERS and MOUNT, JJ., concur.

[No. 4871. Decided March 16, 1904.]

N. W. HINDLE, *Respondent*, v. AUGUSTUS H. HOLCOMB,
Appellant.¹

PLEADINGS—DEMURRER—SEVERAL CAUSES OF ACTION. A complaint which separately states two causes of action is good as against a general demurrer if either cause contains facts sufficient to constitute a cause of action.

PRINCIPAL AND AGENT—FRAUD—PLEADINGS—COMPLAINT—SUFFICIENCY—MISREPRESENTATION OF AGENT AS TO PRICE PAID. A complaint by a principal against his agent states a cause of action where it appears that the agent was employed to purchase a certain piece of property at the lowest price obtainable, but misrepresented the price and retained the difference and converted the same to his own use.

SAME—SETTLEMENT BEFORE DISCOVERY OF FRAUD—RECOVERY OF MONEY PAID WITHOUT OBTAINING RESCISSION. Where an agent induced his principal to purchase property by fraudulent representations, and a settlement is made before the discovery of the fraud, whereby the agent was paid a certain sum and was employed to perform further services, the settlement is void in so far as the fraud in the first transaction enters into the same, and the principal may recover the money paid without obtaining a rescission of the settlement.

SAME—FRAUD AFFECTING SUBSEQUENT CONTRACT. A contract to employ an agent to look after property is void where it was entered into as part payment for previous services in purchasing the property and the agent perpetrated a fraud upon the principal in making such purchase.

TRIAL—PLEADINGS—OBJECTION TO EVIDENCE. An objection to any evidence is not the way to reach a defect in a complaint in that it seeks to recover more than the plaintiff is entitled to.

EVIDENCE—ORAL STATEMENTS RESPECTING WRITTEN CONTRACT. It is not error to permit plaintiff to testify that a written contract was orally agreed to ten days before its execution when it tended to explain an apparent discrepancy in his testimony.

SAME. Where a written contract is not in dispute, conversations leading up to it are inadmissible.

¹Reported in 75 Pac. 873.

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Opinion Per FULLERTON, C. J.

PRINCIPAL AND AGENT—FRAUD OF AGENT IN INDUCING PURCHASE—INSTRUCTIONS. In an action by a principal for the fraud of an agent employed to purchase land at the lowest price obtainable, where the court instructs that the plaintiff can not recover in this form of action, in case the agent was the owner of the land at the time of the employment, another instruction is not erroneous as contradictory where the court simply distinguishes between actual and feigned ownership, and tells the jury that it is immaterial whether the agent had contracted for the land previous to his employment, if he contracted for the sole purpose of selling it to the plaintiff, and had no intention of buying it if he did not sell to the plaintiff.

FRAUD OF AGENT IN MISREPRESENTING PRICE—VALUE OF LAND IMMATERIAL. In an action by a principal for the fraud of his agent in misrepresenting the price paid for land purchased, evidence of the value of the land is immaterial.

TRIAL—CONDUCT OF COUNSEL. It is not reversible error for counsel to ask insinuating questions, when the court rebuked counsel as soon as objection was made and the offense was not repeated.

TRIAL—VERDICT—SUFFICIENCY OF EVIDENCE. The verdict of a jury will not be disturbed where the preponderance of the evidence depends upon the credibility of the witnesses.

TRIAL—INSTRUCTIONS. It is not error to refuse to give instructions in the language requested, when they are given in substance in the general charge.

Appeal from a judgment of the superior court for King county, Albertson, J., entered May 26, 1903, upon the verdict of a jury in favor of the plaintiff for \$900. Affirmed.

Sweeney, French & Steiner, for appellant.

Wright & Kelleher, for respondent.

FULLERTON, C. J.—The respondent, plaintiff below, brought this action to recover of the appellant sums aggregating \$1,290 alleged to have been obtained from him by the appellant by means of false and fraudulent representations. The complaint contained two causes of action. In the first it was alleged, that the respondent employed the appellant as his agent to purchase for him certain real

property, situate in the city of Seattle, at the lowest price for which it could be obtained; that the appellant, while acting as such agent, falsely and fraudulently represented and stated that the lowest price for which the real property could be obtained was the sum of \$4,500; and that the respondent, relying on such statement and believing the same to be true, placed in the hands of the appellant the sum of \$4,500 with which to purchase the property; that the appellant thereafter did purchase the same for and on behalf of the respondent, but paid therefor only the sum of \$3,750, converting to his own use \$750, the difference between the price actually paid for the property and the sum he represented to the respondent that the same would cost, concealing that fact from respondent.

For a second cause of action the respondent repeated the allegations of his first cause of action, and then alleged that, while in ignorance of the deceit practiced upon him, he entered into a written contract with the appellant, by the terms of which the appellant agreed to take charge of the property, supervise the work of having the same cleared and made ready for cultivation, and perform certain other services connected therewith; and that, in "consideration of the services heretofore rendered and hereafter to be rendered," the respondent agreed to turn over to the appellant one-half the profits he should make out of the venture. It is then alleged that, prior to the discovery by the respondent of the fraud originally practiced upon him, the parties settled their rights growing out of the contract, by the terms of which settlement the respondent agreed to pay, and did pay, the appellant the sum of \$540 in full of his supposed rights under the contract mentioned.

The prayer of the complaint is that the respondent have judgment for the sum of \$750 on the first cause of action, and \$540 on the second cause. A general demurrer was

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interposed to the complaint, which being overruled, an answer was filed, admitting the making of the contract set out in the second cause of action and the subsequent mutual settlement between the parties of their rights thereunder, and denying generally all the other allegations of the complaint. A trial was subsequently had before the court and a jury, resulting in a verdict and judgment for the respondent in the sum of \$900. This appeal is from that judgment.

It is first contended that the court erred in overruling the demurrer to the complaint. This demurrer, it will be noticed, was directed to the complaint as a whole, while the complaint was made up of two causes of action, separately stated. The rule in such cases is that, if either of these statements contain facts sufficient to constitute a cause of action, the complaint is good, as against a general demurrer directed to it as a whole. *Chevret v. Mechanics' Mill & Lumber Co.*, 4 Wash. 721, 31 Pac. 24. The facts set forth in the first cause of action are abundantly sufficient to sustain a recovery had thereon. Under all authority, a principal may recover from his agent moneys obtained from him by the agent through false and fraudulent representations, by which the principal is deceived. This cause of action states a transaction of that kind, and being in itself sufficient, it is sufficient to sustain the complaint against the general demurrer, even though the second cause of action might have been susceptible thereto.

On the trial, however, the appellant objected to the introduction of evidence in support of the second cause of action, and assigns as error the overruling of that objection. In support of this it is first said that the complaint itself shows a settlement of all the transactions between the parties, and that the respondent cannot recover moneys paid pursuant to that settlement without suing and obtain-

ing a rescission thereof; and, second, that if it be conceded that there was fraud in the purchase of the property, such fraud would not deprive the appellant of his right to compensation for services rendered in another and separate transaction.

With reference to the first contention, it is sufficient to say that the allegation is that the subsequent contract was entered into, in part, as a settlement of supposed rights growing out of the first, and that the settlement thereunder was made by the respondent while in ignorance of the fraud and deceit that had been practiced upon him in the first transaction. In so far as the fraud practiced in the first transaction entered into the second, the latter was void as to the respondent, and he was at liberty to ignore it, and bring an action to recover any money he had paid in settlement of supposed rights growing out of the first transaction, the same as if it had never been entered into. Contracts entered into through, or induced by, fraud are nullities, in so far as the party affected by the fraud is concerned, and may be treated by him as such.

As to the second objection, it will be remembered that the second contract was made in consideration of services rendered prior to the execution of the contract as well as services thereafter to be rendered. It was intended in part as a payment for the appellant's services in purchasing the land. If it were a fact that the appellant perpetrated a fraud upon the respondent in making that purchase, he was entitled to no compensation for his services in that behalf; and, if the appellant paid him for the same in ignorance of the fraud, he could recover the amount paid in this form of action. But because he claimed more in his complaint than he was perhaps justly entitled to, did not require the court to exclude evidence offered to prove the unobjectionable part. To object on the trial to the intro-

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duction of any evidence is not the way to reach defects in pleadings of this character, and the trial judge did not err in so ruling.

The appellant next complains that the court erred in refusing to strike out the testimony of the appellant to the effect that the contract set out in the second cause of action was agreed to some ten days prior to the time it was reduced to writing and bore date. But there was nothing objectionable in this. The fact was material only in so far as it tended to explain an apparent discrepancy in the testimony of the witness concerning certain dates testified to by him, and for that purpose it was clearly admissible.

Nor did the court err in refusing to permit the appellant to testify to conversations had with respondent, which culminated in the written agreement. The writing contained in the agreement was not in dispute, and could not be disputed, under the issues as made by the pleadings; hence what was said by the parties in making the agreement was not material. Neither were such conversations admissible as tending to contradict the respondent's statements that the written contract was agreed to verbally some ten days prior to the time it was reduced to writing. The witness was permitted to testify when the negotiations leading up to the agreement were commenced and concluded, and his statements in that regard could not have been strengthened by reciting the conversations.

Neither was it error to refuse to permit the appellant to testify to the value of the land purchased. If it be conceded that the respondent did make a good bargain, that fact would be no justification of the appellant's conduct, if it be true that he committed the acts charged against him by the complaint.

The next objection in regard to the conduct of the trial seems not to be supported by the record. It is complained

that the court permitted counsel for the respondent, in his cross-examination of appellant, to ask him insinuating questions, but the record shows that the court rebuked counsel for so doing as soon as objection was made thereto, and that the offense was not repeated. The trial judge might properly have raised the objection himself, when the objectionable question was first propounded, but it was not error for him to omit to do so.

It is next said that the respondent failed to sustain the allegations of his complaint by a preponderance of the evidence, and that the trial court erred in refusing to grant the appellant's motion for a new trial based on that ground. While the respondent's evidence, on many of the material points necessary to be established in order to warrant a recovery, was flatly contradicted by the appellant, and on some of them there was not much, if any, corroborating evidence, still this fact did not require the trial court, nor does it require this court, to decide, as a matter of law, that the evidence did not preponderate in favor of the respondent. Which way the evidence preponderated depended on the credibility of the witnesses, and was a question for the jury and the trial court; and, as the jury and trial court determined it in favor of the respondent, we cannot, in the exercise of our lawful powers, disturb their conclusions.

Lastly, the appellant contends that the court erred in refusing to give certain instructions requested by him, and in giving a certain other, on its own motion. As to the requested instructions, all that was pertinent in them was given in the general charge of the court—not in the language of the request, but in substance, and this, we have repeatedly held, is a sufficient compliance with a request to instruct. The instruction given of which complaint is made was as follows:

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"You are instructed in this action that, if you find from the evidence that the defendant Holcomb took a contract on the land in question for the sole purpose of selling the same to Hindle, and had no intention of buying the land unless he could sell it to Hindle, and that thereafter, in furtherance of such purpose, the defendant falsely represented to plaintiff that Mrs. Webster, or some person other than himself, owned the land, and thereby procured the plaintiff to employ him as agent for the purchase of the land, and that the plaintiff, acting in ignorance of any contract or adverse claim on the part of defendant, employed defendant as his agent to purchase the land, and defendant falsely held himself out to the plaintiff as acting in the interest of the plaintiff and of purchasing the land in the plaintiff's behalf for the lowest price for which it could be obtained from Mrs. Webster, or some other person, and that plaintiff thereby was thrown off his guard, and caused to rely upon the defendant to protect him, then, it is immaterial whether or not the defendant Holcomb contracted for it before or after Hindle came to him and agreed to purchase it."

It is argued that this instruction is contradictory of what had been previously given the jury, and is directly the reverse of the law on the question therein stated. In our opinion, however, it is not subject to either contention. The court did instruct the jury that, if the appellant was the owner of the property, either in fee or by a legal contract of purchase, at the time the respondent employed him to purchase it, the respondent could not recover in this form of action, no matter what representations were made by the appellant. But this is not contradictory of the instruction complained of. The court there was distinguishing between actual and feigned ownership.

On the whole we think there was no substantial error in the record, and the judgment will stand affirmed.

HADLEY, ANDERS, MOUNT, and DUNBAR, JJ., concur.

[No. 4992. Decided March 16, 1904.]

PATRICK MCCARROLL, *Appellant*, v. CITY OF SPOKANE,
Respondent.¹

MUNICIPAL CORPORATIONS — ACTIONS — DEMAND — PLEADINGS — CLAIM FILED INCONSISTENT WITH COMPLAINT. In an action against a city for personal injuries sustained by a pedestrian by a collision with bicycles while plaintiff was walking on a bicycle path, which he was led to believe was a sidewalk, at a place where the city had negligently, as it is alleged in the complaint, failed to provide a sidewalk or any other walk for pedestrians or to give any notice of the nature and use of the path, an objection to any evidence is properly sustained where it appears that the claim required by law to be filed with the city alleged that the plaintiff was run into by bicyclists while walking upon one of the sidewalks of the city, since the same does not state any ground for a recovery and is inconsistent with the complaint, which presents altogether another cause of action.

Appeal from a judgment of the superior court for Spokane county, Belt, J., entered September 18, 1903, upon the verdict of a jury rendered in favor of the defendant by direction of the court, upon sustaining an objection to any evidence. Affirmed.

L. H. Prather, for appellant.

John P. Judson and *A. H. Kenyon*, for respondent.

DUNBAR, J.—This is an action for damages on account of personal injuries, claimed by appellant to have been caused by the respondent's negligence. Appellant alleges in his complaint, that respondent negligently constructed and controlled, in the said city of Spokane, a bicycle path beside a walkway, which it negligently allowed to become impassable for pedestrians, and so negligently constructed said bicycle path and walkway, in relation to each other, as to lead pedestrians to believe that the bicycle path was the

¹Reported in 75 Pac. 973.

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sidewalk, and negligently failed to use any means to inform or show pedestrians that the bicycle path was not the sidewalk, and was dangerous to pedestrians; that, at the place where the injury occurred, the sidewalk was impassable for pedestrians on account of boulders and other obstructions, and the only way to pass was on and along said bicycle path; that said bicycle path was dangerous to pedestrians on account of persons riding bicycles thereon; that respondent knew all these facts, and by the use of reasonable care could have known them; that, during the existence of the conditions aforesaid, on the 20th day of April, 1901, at about 9 o'clock in the evening, it then being dark and the street muddy, appellant was rightfully walking on the sidewalk at said place, and, coming to the space in said walkway where there was no sidewalk, and the walkway being impassable on account of boulders and other obstructions, to proceed on his journey walked on to said bicycle path, believing it to be the sidewalk, and having no knowledge to the contrary, and there being no other place for him to walk; that, while so walking on said sidewalk, two persons rode up behind him on bicycles unawares to him, and rode against and upon him, causing the injuries complained of; that on the 20th day of June, 1901, he filed with the city council of the city of Spokane a claim, as required by the charter of said city, except the filing was sixty days after the accident instead of thirty, as required by said charter; that the said city council duly considered and passed on said claim, and disallowed it; that appellant's injuries were such as to render him incapable, both mentally and physically, of knowing or stating the facts of said injury as to time, place, and circumstances, for more than three months thereafter, and up to the time of filing the complaint herein; that appellant was damaged in the sum of \$20,000, for which he demanded judgment. A demurrer was filed to the complaint on the ground that it did not

state facts sufficient to constitute a cause of action, which demurrer was overruled, and an answer interposed denying negligence on the part of the city, and alleging contributory negligence on the part of the appellant.

After the opening statement of counsel for the appellant to the jury, respondent objected to the introduction of any testimony, upon the following grounds: Because the claim of the plaintiff, presented to the city council, which is attached to plaintiff's complaint, does not state facts sufficient for the basis for an action to recover damages against the defendant city; because the facts stated in plaintiff's complaint are not consistent with, and that they contradict, the statements made in the claim as to the cause or causes of plaintiff's injury, the place of the injury, and negligence of the city; because it appears on the face of the complaint that it does not state facts sufficient to constitute a cause of action; because the opening statement made by plaintiff's counsel to the jury, considered in connection with the claim filed, shows that the plaintiff cannot maintain this action.

The counsel's opening statement was in substantial harmony with the allegations of the complaint. As we view the case on the merits, it is not necessary to discuss the question as to whether or not the claim was filed in time, for it plainly appears that the allegations of the complaint, considering the claim presented to the city council as one of the allegations, are too inconsistent to sustain a judgment, the other material allegations of the complaint contradicting the statements made in the claim. The statements made in the claim which is the basis of the complaint do not show any cause of action against the city. The substance of the claim is that, while the claimant, in the exercise of ordinary care, was walking upon one of the sidewalks of the city, he was run against and upon by two young men who were then and there riding bicycles, and was thereby injured. The city could certainly not be held

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responsible for injuries resulting from a circumstance of this kind, especially in view of the fact that the complaint shows that there was a city ordinance against the riding of bicycles on any of the walks of the city. Nor is the claim strengthened by the bare assertion, following the statement of facts, that the claimant was injured by reason of the city's neglecting and carelessly failing to build and construct proper sidewalks at the place where the claimant received said injuries. The complaint, outside of the statements of the claim presented, presents altogether another case and another theory, viz.: that the injury was caused by reason of the appellant being led to believe by the action of the city that he was walking on one of the sidewalks of the city where he had a right to walk, when in reality he was not on the sidewalk at all, but on a cinder path built especially for bicycle travel. The court did not err in sustaining the objection to the admission of evidence.

The judgment is affirmed.

FULLERTON, C. J., and HADLEY, MOUNT, and ANDERS, JJ., concur.

[No. 4752. Decided March 16, 1904.]

THE STATE OF WASHINGTON, *on the Relation of James Donofrio et al., Respondents*, v. T. J. HUMES, as *Mayor of Seattle, et al., Appellants*.¹

EMINENT DOMAIN—MUNICIPAL CORPORATIONS—JUDGMENT AGAINST CITY ON AWARD—WARRANTS IN SATISFACTION OF JUDGMENT—FUND PROVIDED BY LOCAL ASSESSMENTS NOT ALL COLLECTED—TAKING POSSESSION BY CITY. After a city has condemned land the owners, upon satisfying the judgment received by them for its value, and presenting a transcript thereof pursuant to Bal. Code, § 5676, are entitled to a warrant against the fund provided for the redemption of such warrants, and the city is not excused from issuing

¹Reported in 75 Pac. 348.

state facts sufficient to constitute a cause of action, which demurrer was overruled, and an answer interposed denying negligence on the part of the city, and alleging contributory negligence on the part of the appellant.

After the opening statement of counsel for the appellant to the jury, respondent objected to the introduction of any testimony, upon the following grounds: Because the claim of the plaintiff, presented to the city council, which is attached to plaintiff's complaint, does not state facts sufficient for the basis for an action to recover damages against the defendant city; because the facts stated in plaintiff's complaint are not consistent with, and that they contradict, the statements made in the claim as to the cause or causes of plaintiff's injury, the place of the injury, and negligence of the city; because it appears on the face of the complaint that it does not state facts sufficient to constitute a cause of action; because the opening statement made by plaintiff's counsel to the jury, considered in connection with the claim filed, shows that the plaintiff cannot maintain this action.

The counsel's opening statement was in substantial harmony with the allegations of the complaint. As we view the case on the merits, it is not necessary to discuss the question as to whether or not the claim was filed in time, for it plainly appears that the allegations of the complaint, considering the claim presented to the city council as one of the allegations, are too inconsistent to sustain a judgment, the other material allegations of the complaint contradicting the statements made in the claim. The statements made in the claim which is the basis of the complaint do not show any cause of action against the city. The substance of the claim is that, while the claimant, in the exercise of ordinary care, was walking upon one of the sidewalks of the city, he was run against and upon by two young men who were then and there riding bicycles, and was thereby injured. The city could certainly not be held

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responsible for injuries resulting from a circumstance of this kind, especially in view of the fact that the complaint shows that there was a city ordinance against the riding of bicycles on any of the walks of the city. Nor is the claim strengthened by the bare assertion, following the statement of facts, that the claimant was injured by reason of the city's neglecting and carelessly failing to build and construct proper sidewalks at the place where the claimant received said injuries. The complaint, outside of the statements of the claim presented, presents altogether another case and another theory, viz.: that the injury was caused by reason of the appellant being led to believe by the action of the city that he was walking on one of the sidewalks of the city where he had a right to walk, when in reality he was not on the sidewalk at all, but on a cinder path built especially for bicycle travel. The court did not err in sustaining the objection to the admission of evidence.

The judgment is affirmed.

FULLERTON, C. J., and HADLEY, MOUNT, and ANDERS, JJ., concur.

[No. 4753. Decided March 16, 1904.]

THE STATE OF WASHINGTON, *on the Relation of James Donofrio et al., Respondents*, v. T. J. HUMES, *as Mayor of Seattle, et al., Appellants.*¹

EMINENT DOMAIN—MUNICIPAL CORPORATIONS—JUDGMENT AGAINST CITY ON AWARD—WARRANTS IN SATISFACTION OF JUDGMENT—FUND PROVIDED BY LOCAL ASSESSMENTS NOT ALL COLLECTED—TAKING POSSESSION BY CITY. After a city has condemned land the owners, upon satisfying the judgment received by them for its value, and presenting a transcript thereof pursuant to Bal. Code, § 5676, are entitled to a warrant against the fund provided for the redemption of such warrants, and the city is not excused from issuing

¹Reported in 75 Pac. 348.

such warrant by the fact that the fund therefor is not all collected, and that the city has not yet taken possession of the land.

SAME—DECREE A JUDGMENT—INTEREST. In proceedings to condemn land under the right of eminent domain, the decree of condemnation is a judgment drawing interest at the legal rate.

SAME—INTEREST ON AWARD REGARDLESS OF TAKING POSSESSION—FAILURE TO DISCONTINUE WITHIN TWO MONTHS—ELECTION TO ABIDE BY AWARD. A city can not escape payment of interest upon a decree for the value of land condemned by the fact that it has not taken possession of the land, where it has failed to discontinue the proceedings within two months as required by Bal. Code, § 822, since thereby it elects to abide by the award and appropriate the property.

SAME—INTEREST ON AWARD—RENTS AND PROFITS COLLECTED BY OWNERS TO BE DEDUCTED FROM INTEREST. But where the owner has remained in possession of the land and received the rents and profits therefrom, he is not entitled to interest on the judgment until he makes an accounting and deducts the rents and profits received by him.

Appeal from a judgment of the superior court for King county, Tallman, J., entered March 2, 1903, upon sustaining a demurrer to affirmative defenses in an answer, in a proceeding for a mandamus to compel city officials to issue a warrant in satisfaction of a judgment against the city. Modified.

Mitchell Gilliam and Hugh A. Tait, for appellants.

Sachs & Hale, for respondents.

HADLEY, J.—The respondents in this appeal, who were the relators below, applied to the superior court for a writ of mandate directed to the respondents below, who are the appellants here. The affidavit in support of the application for the writ states, in substance, that on the 30th day of January, 1902, in an action entitled "In the Matter of the Petition of the City of Seattle, Condemnation Proceedings under Ordinance No. 6047, Rainier Avenue, Cause

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No. 29,945," then pending in the superior court of King county, such proceedings were had that a judgment was rendered in favor of the relators, and against the petitioner in the action, in the sum of \$800 and costs of suit; that said judgment has not been paid, in whole or in part, and no appeal therefrom has ever been taken; that, after the time when execution might have been issued on a like judgment against a private person, to wit, on January 19, 1903, the relators presented to the appellants a certified transcript of the docket of said judgment, showing satisfaction thereof duly entered; that the relators thereupon demanded of appellants, as the proper officers, that they should draw an order upon the treasury of the city of Seattle and in favor of relators for the amount of said judgment, which demand was refused; that, at the time of the presentation of the transcript of judgment, as aforesaid, there was in the treasury of the city, in a fund known and designated as the "Rainier Avenue Condemnation Fund, Ordinance No. 6047,"—it being the fund out of which said judgment should properly be paid—more than sufficient money to pay the judgment with interest, costs, and accrued costs.

The appellants, as respondents to the application in the superior court, answered that the judgment mentioned in relators' affidavit was rendered in a proceeding brought by the city of Seattle, a city of the first class, under and by virtue of the laws of the state of Washington relative to the right of eminent domain in cities of the first class, and in pursuance of an ordinance providing for the condemnation of certain property to be used as a public street in said city; that in said proceeding a judgment was rendered against the city and in favor of one hundred and seventy-seven owners, aggregating the total sum of \$8,442.50, as compensation for property taken or damaged, and in said

judgment it was ordered that said relators should recover the amount stated in their affidavit, as compensation to them for property taken or to be taken for use as a portion of said street; that the ordinance authorizing the condemnation proceeding provides that an assessment shall be made for the purpose of raising the amount necessary to pay the compensation and damages for property taken, and that such part, only, of such compensation or damages as is not finally assessed against the property benefited, shall be paid from the general fund of the city; that said judgment provides that, upon the payment to the judgment holders, or into the registry of the court, of the several amounts with costs, the city shall become the owner and entitled to the possession of the property described in the verdicts, for the uses and purposes mentioned. It is next alleged, that the city proceeded to assess the amount of benefits to property benefited, for the purpose of providing the fund to pay said compensation or damages; that the total amount assessed is \$5,601.50, which sum the city is now proceeding to collect; that \$3,248.09 has already been collected, and there remains to be collected upon the assessment roll the sum of \$2,353.41; that the appellants refused to draw their warrant upon the treasurer of the city for the payment of said judgment for the sole and only reason that there is an insufficient amount collected upon said assessment roll, or in said improvement district fund, for the payment of the total amount of the judgment rendered in said condemnation proceedings; that they stand ready and willing, as soon as the amount of said assessment roll shall have been collected, to pay into court the sum so collected, together with a sum sufficient from the general fund of the city, to be paid out to the persons entitled to receive the same, as the court shall direct; that the city is not now, and never has

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been, in possession of any part of the property belonging to the relators which was condemned in said proceeding, and for which they obtained said judgment; that the improvement for which said condemnation proceeding was had has not been commenced, and that relators are now, and at all times since the rendition of the judgment have been, in possession of the whole of their premises, and have enjoyed the beneficial use thereof.

To the answer, which is in substance stated above, the relators demurred on the ground that it does not state facts sufficient to constitute a defense. The demurrer was overruled. The appellants elected to stand upon their said answer, and refused to plead further. Judgment was thereupon entered, directing the issuance of the peremptory writ prayed. This appeal is from that judgment.

We have, somewhat at length, set out the averments in the pleadings in order that the points raised by the ruling on the demurrer may be more readily understood. Appellants contend that an award to one or more individual owners of property proposed to be taken, in a condemnation proceeding by a city of the first class, where the ordinance directing such proceeding provides for a local assessment, is not payable until the collection by the city of the entire amount of such local assessment. It is said by them that the constitution of the state, art. 1, § 16, gives the city the right to make payment into court. The following extract from that section is referred to as giving that right: "No private property shall be taken or damaged for public or private use without just compensation having been first made or paid into court for the owner, . . ." It is also stated that said provision is carried into effect by the statute wherever the subject of payment is mentioned, and attention is called to the fact that the judgment relied upon

here so provides. Reference is made to the statute authorizing a condemnation proceeding of the kind above mentioned, as found in title 7, chapter 7, Bal. Code, which treats of eminent domain in cities of the first class. It is insisted that, under the provisions of the law, and also of the judgment, the right to pay the several amounts into court is given, and that it follows that the city has the right to make the whole payment at once, which cannot be done until after the collection of the whole local assessment.

The argument, it seems to us, does not reach the real point involved here. Respondents are not asking any directions to appellants touching the custodianship of this condemnation fund. They are asking only the issuance of a warrant, drawn upon such fund, for the amount of their judgment. When the moneys have once been paid into such fund, they become a part of it, and must remain such until applied to the purposes intended. The mere deposit of the money in court, if done to carry out the purposes of the fund, would not remove it from the fund. If the city should insist upon the right to deposit the money in court, it must be done in trust for the purposes of the fund, and the surrender of the warrants drawn upon it would doubtless be required as a condition precedent to individual payments from such deposited fund.

The city may, however, satisfy this judgment as it does any other when the holders are willing to accept satisfaction in that manner. Following the provisions of §5676, Bal. Code, respondents have caused said judgment to be satisfied on the docket thereof, and have presented to appellants a transcript showing the judgment and its satisfaction of record. If the judgment is such as is contemplated by the above section, then they are entitled to their warrant. We see no reason why it is not such a judgment. It ad-

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judges the recovery of the money or damages. It is true the effect of the judgment, when the money is paid, is also to pass title to real estate, but it is none the less a judgment for the recovery of money. Such an adjudication was expressly held to be a judgment in *Plum v. City of Kansas*, 101 Mo. 525, 14 S. W. 657, 10 L. R. A. 371. It is provided by section 816, Bal. Code, as follows:

"All moneys received or collected by the treasurer upon assessments for any purpose authorized by this chapter shall be kept as a separate fund, and in nowise used for any other purpose whatever, except for the redemption of warrants drawn against such fund."

The above section applies to this fund, and we think in reason it is contemplated that warrants shall be drawn to the order of the several judgment holders in the condemnation proceedings. When the transcript of the satisfied judgment is presented, and the warrant issued, the latter thereafter becomes the evidence of the city's obligation. It represents a liquidated sum, which the city is obligated to pay from a given fund. We do not see that any confusion can arise as to the proper parties to receive payment, as suggested by appellants. This is not a demand for cash, but for a warrant representing cash. If the property holder were demanding cash before possession taken by the city, a different question would be presented as to his constitutional right to a money compensation as a condition precedent to such possession. Appellants are, however, asking a warrant only, and we think it is their right to have it.

It is assigned that the court erred in directing the issuance of a warrant including interest on the amount of the judgment from the date thereof. The first suggestion in support of this assignment is that the adjudication of condemnation and the award of damages is not a judg-

ment, within the purview of the statute allowing interest upon judgments. Laws of 1899, p. 129, § 6. What has already been said as to the judgment character of said adjudication answers the contention that it is not a judgment. Being a judgment, it must therefore draw interest at the rate of six per cent per annum from its date, under the concluding provision of the section cited.

It is further urged that § 776, Bal. Code, authorizes the city to provide the entire cost by local assessment, and that it is impossible for the commissioners making the assessment in such proceedings to determine the amount of interest that may become due the holders of the condemnation judgments, and provide for its payment by assessment. This argument is based upon the theory that the commissioners would have no means of determining when the assessments would be paid or collected, so as to make it possible to pay the awards to the property holders. A possible deficit of the kind mentioned would largely be covered by the ten per cent penalty, which must be added to the amount of the assessment upon the day of sale, under § 808, Bal. Code. If there are no delinquent payments, the amount of accumulated interest must be small, and if the sale of delinquent property is timely made, the penalty will largely meet the accumulated interest. In any event, the law authorizes, and the city in this instance provided, that whatever sum is not assessed against the property shall be paid by the city out of its general fund. That the judgment in question is such as bears interest from the date of its entry, see, *Alloway v. Nashville*, 88 Tenn. 510, 13 S. W. 123, 8 L. R. A. 123; *Plum v. City of Kansas*, *supra*; 2 Lewis, Eminent Domain (2d ed.), § 499; 3 Sutherland, Damages (2d ed.), § 1091.

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It is, however, urged that the city has not yet taken possession of the condemned property, that appellants have had the benefit of the use thereof, and should therefore not recover interest upon their award. Section 822, Bal. Code, provides that the city may, within two months from the date of the condemnation judgment, if no appeal be taken, discontinue the proceedings and pay the costs. Not having so discontinued the proceeding in question, it must be held that the city has elected to abide by the award and appropriate the property. It follows that, since the expiration of said two months' period, the appropriation has been complete, with the exception of actual satisfaction of the judgment and taking possession by the city, which it was at liberty to do at any time. The proceeding has, therefore, resulted in an obligation which is binding upon the city, and from which it may not withdraw, at least not without consent of the property judgment holders.

But may the judgment holder retain the rents and profits of the land, and for the same time recover interest upon the condemnation award? Respondents urge the following quotation from *Plum v. City of Kansas, supra*, as applicable to this point:

"The long delay in reaching the end of the condemnation case arose from the acts of other parties. During it the plaintiff remained in possession of the land, but his enjoyment and use thereof were not such as belonged to complete ownership. His tenure then, might be characterized as a sort of base or qualified fee, liable to be determined at any moment by the issue of the appellate proceedings. He could not, with any degree of confidence, improve the property, or make any but the most transient agreements for its use. He could not dispose of it except subject to the paramount public easement which had become impressed upon it. So far as concerned his bene-

ficial rights as owner, the judgment of condemnation amounted to the 'taking' of the property for public use, and the price for such taking then became justly due him."

It will be observed that the above quoted argument goes only to the point that, under the circumstances detailed, the condemnation judgment amounted to a taking, and the owner was entitled to the price for such taking, but it does not say that interest on that price may be collected without accounting for rents when the owner remains in possession.

In that case it was held, as we have seen, that the judgment of condemnation draws interest, but there, as in the case at bar, the owner remained in possession for a time, and the court expressly held that it would be inequitable to permit him to recover interest and at the same time retain the benefits of the possession held by him, meanwhile, as trustee for the city. The landholder sought to enjoin the city from taking possession without paying lawful interest from the date of the award of damages. The court stated that before obtaining relief he should do equity, and should account for rents and profits which accrued to him after the condemnation. Thus, in a measure, the rents and profits were held to offset the interest. But that the one was the necessary legal equivalent of the other was not held. Neither can it be so held here. The rate of interest upon the judgment is fixed by law, but the value of rents and profits depends upon market conditions. We think the rule followed in the Missouri case cited is eminently just, and under that rule the respondents here are not entitled to a warrant including interest, inasmuch as there has been no accounting for rents and profits. If an accounting were here, and an excess of interest over rents appeared, respondents would be entitled to have such excess in-

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Syllabus.

cluded in their warrant. On an accounting, however, the city would not be entitled to deduct from the face of the judgment any excess of rents over interest, for the reason that no express contract to pay any sum as rent exists, and since the city has voluntarily permitted the use and occupation, it ought not to be heard to demand a sum in excess of its own fixed interest obligation in the premises. Respondents therefore are now entitled to a warrant for the face amount of their judgment.

The judgment is sustained as far as it relates to the principal sum of the condemnation judgment, but it should be modified to the extent of excluding from the warrant interest upon the judgment. The cause is therefore remanded, with instructions to modify the judgment in accordance with what is said above. Appellants shall recover costs.

ANDERS, MOUNT, and DUNBAR, JJ., concur.

[No. 4665. Decided March 16, 1904.]

SEWALL SANDERS, *Appellant*, v. STIMSON MILL COMPANY,
Respondent.¹

SEAMAN—ACTION BY SEAMAN FOR PERSONAL INJURIES—COMPLAINT IN TORT—NO RECOVERY UNDER MARITIME CONTRACT—QUESTION FIRST RAISED ON APPEAL. In an action by a seaman for an injury while in the service of the ship where the complaint is in tort for the negligence of the defendant, without any element of maritime contract, the plaintiff, upon failing to establish negligence, is not entitled to recover for medical attendance and expenses incident to his recovery, under a maritime contract, when the question was first raised on appeal, since the case must be determined upon the theory on which it was tried below (*Sanders v. Stimson Mill Co.*, 32 Wash. 627, overruled in part).

¹Reported in 75 Pac. 974.

84	857
85	230
34	357
137	117
34	357
40	47
40	198

SAME—ACTIONS—JOINDER OF ACTION IN TORT AND ON CONTRACT.
An action in tort for personal injuries to a seaman through negligence of his employer cannot be joined with an action on the maritime contract for medical attendance and expenses incident to his recovery.

Appeal from a judgment of the superior court for King county, Morris, J., entered February 21, 1903, upon granting a nonsuit. Affirmed.

Scott Calhoun, John E. Humphries, and Harrison Bostwick, for appellant.

Root, Palmer & Brown, for respondent.

ON PETITION FOR REHEARING.

DUNBAR, J.—This case was originally argued and submitted at the May term of court, 1903, and the decision is reported in 32 Wash. 627, 73 Pac. 688, where a statement of the case can be found.

It was there decided that there was no negligence on the part of respondent which was shown to be the proximate cause of the injury to the appellant, and the action of the trial court in taking the case from the jury and rendering judgment for the respondent on that ground was approved. But, upon the argument of the case in this court, it was contended by the appellant that he was entitled, under a maritime contract, to compensation for medical services and attentions and other expenses incident to his recovery, he being hurt while in the service of the ship, regardless of the question of negligence. This view was adopted by this court, and the judgment was modified to that extent, and the cause remanded with instructions to the trial court to allow appellant to introduce proof of damages of this character. Upon petition for rehearing being filed by both appellant and respondent, the cause was reassigned, and has been again argued and submitted.

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Upon the main question in relation to want of negligence of the defendant company, and the lack of proof of proximate cause, we are satisfied with our former decision and will not discuss it again. But, upon a reconsideration of the subject, we think we erred in holding that the appellant was entitled to compensation of any kind under a maritime contract, express or implied, so far as this action is concerned. For, whatever the law may be upon that subject, the question is not presented here, as an examination of the complaint shows conclusively that the appellant sued in tort, and that the action was brought to recover for damages sustained by the alleged negligence and wrongful acts of the respondent, and that there is no element of maritime contract expressed or intimated in the complaint, or any of the succeeding pleadings; but the pleadings throughout were framed as are the pleadings in the ordinary personal damage case, involving only the questions of negligence, contributory negligence, and assumption of risks incident to the employment. Not only were these the only issues presented to the trial court by the pleadings, but the trial of the cause was confined exclusively to these issues, and an examination of the record shows that no claim whatever was made during the trial that anything was due the appellant by virtue of a contract of any kind, this question being raised for the first time in this court. We have uniformly held, for reasons that must be manifest without repetition, that we will determine a case here upon the theory upon which it was tried below, and that alleged errors which were not called to the attention of the court would not be reviewed here. See, *Bethel v. Robinson*, 4 Wash. 446, 30 Pac. 734; *Weigle v. Cascade Fire etc. Ins. Co.*, 12 Wash. 449, 41 Pac. 53; *Hardin v. Mullin*, 16

Wash. 647, 48 Pac. 349; *Coleman v. Montgomery*, 19 Wash. 610, 53 Pac. 1102; and many other cases.

Not only was there no claim for damages of this character made in the cause, but it could not have been made in this action; for under our code, an action in tort and an action on contract cannot be joined. *Clark v. Great Northern Ry. Co.*, 31 Wash. 658, 72 Pac. 477.

The judgment is affirmed.

FULLERTON, C. J., and HADLEY, MOUNT, and ANDERS, JJ., concur.

[No. 4962. Decided March 16, 1904.]

R. H. SIMPSON *et al.*, Respondents, v. H. F. WEISE,
Appellant.¹

EVIDENCE—WRITTEN CONTRACT—ORAL PROOF AND MEMORANDUM.
In an action upon a written contract alleged to be in the possession of the defendant, where the defendant upon demand refuses to produce it, but denies that there is any such contract, the plaintiff may prove the contract orally and by a memorandum from which he claims it was made.

Appeal from a judgment of the superior court for King county, Tallman, J., entered May 15, 1903, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury. Affirmed.

Louis Henry Legg, for appellant.

PER CURIAM.—The action is upon a written contract; judgment for plaintiffs. The only legal assignment is that the court erred in permitting the respondents to offer in evidence a memorandum of the contract. The appellant objected to its introduction on the ground that a demand had been made for a copy of the written agreement on which

¹Reported in 75 Pac. 973.

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the suit was founded, and that the same had never been furnished. It appears from the testimony, that the agreement in question had been written by the defendant; that the plaintiffs had made a demand upon the defendant for the written agreement or a duplicate thereof, which the defendant had agreed to furnish to plaintiffs, but that he had neglected to furnish it, and that the plaintiffs had been unable to obtain it; and that the evidence introduced was simply a memorandum for the purpose of refreshing the memory of the plaintiffs. Upon the objection being made it was said by the court:

"There has been no testimony that this is a copy of the contract. They sue on the contract, and they put a witness on the stand, and he says, that he has not a copy of that contract, and never did have; that the original was with the defendant; that he asked for a copy; they promised him a copy, and he asked for it, and they never gave it to him. I asked you then if you had the original, and I was referred to the answer and the answer denies ever having made this contract or any contract either oral or in writing. Now, then, he is doing the next best thing which the law allows—proving that contract orally and by memorandum, and this memorandum that he claims from which the written contract was made."

The statement of the court seems to be justified by the testimony, and there was no error in admitting the memorandum under the circumstances.

On the merits of the case, we are satisfied with the conclusions reached by the trial court.

The judgment is affirmed.

34 362
41 135

[No. 4985. Decided March 16, 1904.]

JOHN G. HUNT *et al.*, Appellants, v. ALBERT A. PHILLIPS
et al., Respondents.¹

WILLS—CONTEST—BURDEN OF PROOF—APPEAL—TRIAL DE NOVO. Upon the contest of a will which has been admitted to probate *ex parte*, the burden of proof is upon the contestants to establish every material fact alleged; but the ruling of the trial court upon this point is immaterial, since the supreme court tries the case *de novo*.

APPEAL—HARMLESS ERROR—TRIAL DE NOVO. The admission of incompetent evidence is harmless where the supreme court tries the case *de novo* on appeal.

WILLS—CONTEST—CONSTRUCTION—NO PRESUMPTION IN FAVOR OF HEIRS. In construing a will contested by disinherited heirs, no presumptions can be indulged in favor of rights conferred by the law of descent and distribution, which are no more potent than the right to make a voluntary distribution.

WILLS—EXECUTION—UNDUE INFLUENCE—COSTS TO CONTESTANTS. Evidence examined, and found to sustain findings of due execution, lack of undue influence, and testamentary capacity, and that an allowance for costs to the contestants was properly refused.

Appeal from a judgment of the superior court for Thurston county, A. L. Miller, J., entered July 2, 1903, after a trial on the merits before the court without a jury, decreeing the validity and due execution of a will. Affirmed.

W. F. Arnold and Ben Sheeks (J. W. Robinson and J. B. Reavis, of counsel), for appellants. Upon the contest of a will probated *ex parte*, the burden of proof is upon the proponents. *Hubbard v. Hubbard*, 7 Ore. 42; *Heirs of Clark v. Ellis*, 9 Ore. 128; *Luper v. Werts*, 19 Ore. 122, 23 Pac. 850; *In re Mendenhall's Will*, 43 Ore. 542, 73 Pac. 1033; *Sawyer v. White*, 122 Fed. 223; *Lamb*

¹Reported in 75 Pac. 970.

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Citations of Counsel.

v. Helm, 56 Mo. 420; *Benoist v. Murrin*, 48 Mo. 48; *Tingley v. Cowgill*, 48 Mo. 291; *Craig v. Southard*, 148 Ill. 37, 35 N. E. 361; *Carpenter v. Calvert*, 83 Ill. 71; *Taylor v. Cox*, 153 Ill. 220, 38 N. E. 656; *Bevelot v. Lestrade*, 153 Ill. 625, 38 N. E. 1056; *Rigg v. Wilton*, 13 Ill. 15, 54 Am. Dec. 419; *Tate v. Tate*, 89 Ill. 42; *Moyer v. Swygart*, 125 Ill. 262, 17 N. E. 450; *Tucker v. Sandidge*, 85 Va. 556, 8 S. E. 650; *Riddell v. Johnson's Ex'r*, 26 Grat. (Va.) 152; *Chappell v. Trent*, 90 Va. 849, 19 S. E. 314; *Crowninshield v. Crowninshield*, 2 Gray 527; *McMechen v. McMechen*, 17 W. Va. 683, 41 Am. Rep. 682; *Williams v. Robinson*, 42 Vt. 658, 1 Am. Rep. 359; *Barlow v. Waters* (Ky.), 28 S. W. 785; *Fee v. Taylor*, 83 Ky. 259; *Johnson v. Stivers*, 95 Ky. 128, 23 S. W. 957; *Porschet v. Porschet*, 82 Ky. 93, 56 Am. Rep. 880; *Robinson v. Adams*, 62 Me. 569; *In re Thomas*, 111 N. C. 409, 16 S. E. 226; *In re Burns' Will*, 121 N. C., 336, 28 S. E. 519; *Livingston's Appeal*, 63 Conn. 68, 26 Atl. 470; *Rockwell's Appeal*, 54 Conn. 119, 6 Atl. 198; *Brown v. Walker* (Miss.), 11 South. 724; *Swain v. Edmunds*, 53 N. J. Eq. 142, 32 Atl. 369; *Kempsey v. McGinniss*, 21 Mich. 123; *Aikin v. Weckerly*, 19 Mich. 482; *Taff v. Hosmer*, 14 Mich. 309; *Evans v. Arnold*, 52 Ga. 169; *Beazley v. Denson*, 40 Tex. 436; *Roberts v. Welch*, 46 Vt. 164; *Williams v. Robinson*, 42 Vt. 658, 1 Am. Rep. 359; *Donovan v. Fowler*, 17 Neb. 247, 22 N. W. 424; *Seebrook v. Fedawa*, 30 Neb. 424, 46 N. W. 650; *Delafield v. Parish*, 25 N. Y. 35. The will was not duly executed because the attesting witnesses did not witness the execution, and did not sign in the presence of each other or know that the paper was a will. *Luper v. Werts*, 19 Ore. 122, 23 Pac. 850; *Richardson v. Orth*, 40 Ore. 252, 66 Pac. 925, 69 Pac. 455; *In re Skinner's*

Will, 40 Ore. 571, 62 Pac. 523, 67 Pac. 951; *In re Mendenhall's Will*, *supra*; *In re Layman's Will*, 40 Minn. 371, 42 N. W. 286; *Tobin v. Haack*, 79 Minn. 101, 81 N. W. 758; *Chase v. Kittredge*, 11 Allen 63, 87 Am. Dec. 687; *Reed v. Watson*, 27 Ind. 443; *Swift v. Wiley*, 1 B. Mon. 114; *Simmons v. Leonard*, 91 Tenn. 183, 30 Am. St. 875; *Lewis v. Lewis*, 11 N. Y. 220; *In re Will of Mackay*, 110 N. Y. 611, 18 N. E. 433, 6 Am. St. 405; *In re Laudy's Will*, 148 N. Y. 403, 42 N. E. 1061. It was not duly attested because not signed by the testatrix at the time the witnesses signed. *Chase v. Kittredge*, *supra*; *Sisters of Charity v. Kelly*, 67 N. Y. 413; *Jackson v. Jackson*, 39 N. Y. 153; *Mitchell v. Mitchell*, 16 Hun 97, 77 N. Y. 596; *Chaffee v. Baptist M. S.*, 10 Paige 86, 40 Am. Dec. 225; *Brinckerhoof v. Remsen*, 8 Paige 488; *Rutherford v. Rutherford*, 1 Denio 33, 43 Am. Dec. 644; *Brooks v. Woodson*, 87 Ga., 379, 13 S. E. 712; *Duffie v. Corridon*, 40 Ga. 122; *Fowler v. Stagner*, 55 Tex. 393; *Reed v. Watson*, 27 Ind. 443; *Simmons v. Leonard*, 91 Tenn. 183, 18 S. W. 280, 30 Am. St. 875; *Ragland v. Huntingdon*, 23 N. C. 561; *In re Cox Will*, 46 N. C. 321; *Keyl v. Feuchter*, 56 Ohio St. 424, 47 N. E. 140; *Allen v. Griffin*, 69 Wis. 529, 35 N. W. 21; *Schermerhorn v. Merritt*, 123 Mich. 110, 82 N. W. 513.

T. N. Allen, Troy & Falknor, and *C. D. King*, for respondents.

DUNBAR, J.—This is a proceeding in contest of the will of Abbie Howard Hunt Stuart, deceased, a resident of Thurston county, Washington, who died in San Francisco, California, on the 5th day of January, 1902. The will was executed on the 18th day of September, 1901, and Mrs. Stuart died on the 5th day of the following

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January. On January 14, 1902, a document purporting to be the will of decedent was probated by the superior court for Thurston county. This document named Albert A. Phillips and Henry B. McElroy as executors. The will disinherited all of the relations of the decedent, except John G. Hunt, a brother, who was bequeathed \$100. The assets of the estate are variously estimated at from \$50,000 to \$100,000, and, aside from mementoes and bequests of some considerable value to Albert A. Phillips and Georgiana S. Govey, the will devised said estate, in equal parts, to Eva W. Gove of Tacoma, Washington, Mary Lowe Dickinson of New York, and Sarah M. Utt of California, none of whom are related to decedent.

Within the statutory period John G. Hunt, a brother, and the nieces and nephews of the deceased, whose parents are dead, filed their verified petition in contest, alleging the relationship of the contestants to the decedent, and showing petitioners to be the only heirs at law of Mrs. Stuart. They also set forth in their petition their objections and exceptions to the *ex parte* probate of the alleged will—because the same was not the will of Abbie H. H. Stuart; because the same was not signed by her, or witnessed, or attested, as by law required, or at all; because decedent was of unsound mind and incapacitated from lawfully devising her property; and alleged that, at the date of the execution of the paper writing purporting to be a will, and long prior thereto, Eva W. Gove and other principal legatees, exercised a strange, abnormal, and unlawful influence over the decedent, and, as a result thereof, they unduly and fraudulently influenced her to make the will in question and to disinherit the petitioners. Issues were substantially made up by denial of the material contesting allegations.

At the beginning of the trial, which was before the court without a jury, attorneys for the contestants moved that the proponents be required to establish the will *prima facie*, before the contestants were required to introduce any evidence in support of their objections and exceptions and the negative allegations in the petition, for the reason that, the relationship being admitted, the contestants, as the heirs at law of deceased, had a right to rest upon the law of descent and distribution. The court however ruled that the burden of proof was upon the contestants; that they must establish every material affirmative and negative allegation of facts contained in their petition, by a fair preponderance of the evidence. To this ruling the contestants saved an exception, and the trial proceeded upon that theory, and a decree was entered upholding the will, from which this appeal is taken.

After the decree had been made, contestants applied to the court for allowance of costs and attorney's fees which was denied, and this ruling is also here for review. The court found, in addition to the date of the death, execution of the will, etc., as set forth above, that said will was duly presented for probate by said executors; that its due execution, publication, and attestation on the 18th day of September, 1901, together with the death of the testatrix as aforesaid, were proven to the satisfaction of said court on the 14th day of January, 1902, as was also the testamentary capacity of said testatrix at the time she made her said will; that the testimony was duly reduced to writing, and subscribed and sworn to by the attesting witnesses on the said 14th day of January, 1902; and that on said last mentioned day a finding of fact and certificate in accordance with said testimony was duly made and entered by the court and judge thereof, establishing said will, and admitting the

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same to probate, and directing letters testamentary to issue to said executors; that thereupon testamentary letters were duly issued to said executors, who took possession and control of said estate, and entered upon the discharge of their duties as said executors—reciting the institution of the action by Hunt and others, and the grounds of the contest; and finding, that the testatrix, at the time of the execution of the will, was of sound mind and disposing memory; that she was not unduly influenced in disposing of her estate thereby; that said will was in writing, and was wholly written by her, the said Abbie Howard Hunt Stuart, together with the attestation clause, and was duly subscribed and published by her in the presence of two competent attesting witnesses, and that said witnesses, in her presence, and at her request, and in presence of each other, duly witnessed and attested the same by subscribing their names thereto; and that in all respects said will was duly and legally executed, published, and attested.

As a conclusion of law, it was found that the will and testament aforesaid was in all respects a valid instrument, and was the last will and testament of said Abbie H. H. Stuart, and that the disposition made therein of the real and personal estate of said testatrix was legal, binding, and sufficient; that said disposition was conclusive as to the rights or claims of all persons whomsoever, including the contestants or plaintiffs in this action; that the contestees or defendants were entitled to a judgment in conformity to said findings and conclusions. Certain findings of fact and conclusions of law were proposed by the contestants, which were denied by the court.

The first contention of appellants is that the court erred in overruling the motion of the attorneys for contestants that the proponents be required to establish the will

prima facie, before the contestants were required to introduce any evidence in support of their objections and exceptions and the negative allegations in the petition. We think the court did not err in overruling the motion. The will had already been established prima facie. That being true, it must stand as a valid will until such prima facie establishment has been overcome by the evidence of the contestants. We think, instead of doing violence to the ordinary rules of pleading and evidence, the ruling of the court was in exact harmony with the general proposition of law that the burden of proving a proposition is upon him who asserts it. In addition to this, this question was squarely before this court in *Higgins v. Nethery*, 30 Wash. 239, 70 Pac. 489, where it was decided that, where the record showed that the court had jurisdiction, and the facts showed prima facie a valid will, the burden was on the appellants to show that the will was invalid. And, further, it is immaterial to the consideration of this case by this court what the ruling in this respect was, as this court tries the case *de novo*, and will give to the whole testimony such weight as it thinks it is entitled to.

This disposes also of the objection to the admission of certain affidavits. If testimony admitted is not competent, it will not be considered. But, as we have repeatedly announced, in a case tried *de novo* in this court, the admission of incompetent testimony will not be grounds for the reversal of a judgment, although for manifest reasons the refusal of the trial court to admit competent testimony would ordinarily be good ground for reversal.

The other questions involved reach the merits of the case. A great deal is said in the elaborate briefs of counsel for appellants upon the duty of courts to construe wills

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with reference to the rights of heirs at law conferred by the law of descent and distribution. But the rights conferred by the law of descent and distribution are no more potent than the right conferred by the law to make a voluntary distribution of one's estate. It is doubtless true that the law of descent and distribution disposes of the estate, in the absence of testamentary disposition, in accordance with the dictates of common affection, but the right of independent disposition is just as absolute, and no presumption can be indulged in against the exercise of this legal right. A case in many respects similar to the one at bar was that of *In re Gorkow's Estate*, decided by this court and reported in 20 Wash. 563, 56 Pac. 385. In reviewing the facts in that case, it was said by this court:

"The substantial facts, without controversy, shown were, that the deceased was a man of violent and ungovernable passions; that he was inordinately dissipated; that his acts evinced a total want of moral nature and natural affection; that he had for a number of years preceding his death been the subject of several painful maladies, some of them incurable, and that physically his system was completely wrecked; that he required a body servant for a considerable time constantly in attendance; that his second marriage was eccentric, foolish and, from every reasonable standpoint, reprehensible. In fact, it may be conceded from the whole testimony that the deceased, as stated in the rather vigorous language of counsel for petitioner, was 'a moral leper,' and that the inference might reasonably be drawn from all these facts that his mental vigor was impaired. Indeed, the record does not disclose any particular mental capacity or traits in the deceased except the ability to make and take care of money during his life. But the capacity required for a will is very well summed up, and stated, as the deduction from a long line of recognized authorities, by Judge Redfield in the following language; 'The result of the best considered cases

upon the subject seems to put a quantum of understanding requisite to the valid execution of a will upon the basis of knowing and comprehending the transaction, or, in popular phrase, that the testator should at the time of executing the will know and understand what he was about.'"

And the following quotations are excerpts from decisions cited with approval by this court:

"The right of a testator to dispose of his estate depends neither on the justice of his prejudices nor the soundness of his reasoning. He may do what he will with his own; and if there be no defect of testamentary capacity, and no undue influence or fraud, the law gives effect to his will, though its provisions are unreasonable and unjust." *Clapp v. Fullerton*, 34 N. Y. 190, 90 Am. Dec. 681.

"It is a testator's privilege to make such disposition of his property as he pleases, and, if the will is his—that is, if it is the voluntary act of a competent testator—it must stand, if properly executed in form." *Mitchell v. Mitchell*, 43 Minn. 73, 44 N. W. 885.

"It may be harsh, and, under some circumstances, cruel to disinherit one child and to distribute the estate among the others, but if the testator be of sound mind and execute his will as prescribed by law, no court can interfere." *Potter v. Jones*, 20 Ore. 239, 25 Pac. 769, 12 L. R. A. 161.

"But the right to dispose of one's property by will is most solemnly assured by law, and is a most valuable incident to ownership, and does not depend upon its judicious use. The beneficiaries of a will are as much entitled to protection as any other property owners, and courts abdicate their functions when they permit the prejudices of a jury to set aside a will merely upon suspicion, or because it does not conform to their ideas of what was just and proper." *In re McDevitt*, 95 Cal. 17, 30 Pac. 101.

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"He may disinherit either wholly or partially his children and leave his property to strangers to gratify his spite, or charities to gratify his pride, and we must give effect to his will, however much we may condemn the course he has pursued." *Boughton v. Knight*, 6 Moak, Eng. Rep. 349.

An analytical review of the testimony in the case would be unprofitable. It is sufficient to say that, from an examination of all the testimony, we think the findings of the court were fully justified, both as to the legal execution of the will and the lack of undue influence exercised upon the testator, as alleged by contestants; and that it plainly appears that, at the time of the execution of the will, the testator was of a sound and disposing mind.

It is not necessary to enter into a discussion of the question of the power of the court under the statute to award costs to the contestants, for we do not think that the record discloses a case which, under the circumstances, would justify the court in awarding such costs.

The judgment is in all things affirmed.

FULLERTON, C. J., HADLEY, MOUNT, and ANDERS, JJ.,
CONCUR.

[No. 4894. Decided March 17, 1904.]

MARGARET O'TOOLE, *Appellant*, v. L. B. FAULKNER,
Respondent.¹

HUSBAND AND WIFE—PARTIES—ACTION FOR PERSONAL INJURIES—
ESTATE OF DECEASED HUSBAND—INTEREST IN SPECIAL DAMAGES.
In an action for personal injuries of a permanent and continuing
character sustained by a married woman, the estate of the hus-
band, upon his death before suit, may be joined as a party plain-
tiff where the community appears to be interested in special dam-
ages for medical attendance and other disbursements.

¹Reported in 75 Pac. 975.

WITNESSES—EVIDENCE OF TRANSACTIONS WITH DECEASED—PARTY IN INTEREST—EMPLOYEE OF STREET CAR COMPANY—ACTION FOR NEGLIGENCE OF EMPLOYEE. Where a street railway company is sued for personal injuries by the estate of a deceased person, sustained through the negligence of the motorman in charge of the car at the time of the accident, such employee is not a party in interest, and may testify as to a conversation had between him and the deceased, relative to the accident, when he was not made a party, and was not notified to appear and defend.

NEW TRIAL—NEWLY DISCOVERED EVIDENCE—CUMULATIVE TESTIMONY. It is not error to refuse a new trial for newly discovered evidence where it is merely cumulative and although it is cumulative only of the testimony of the party to the action.

Appeal from a judgment of the superior court for Thurston county, Linn, J., entered February 18, 1903, upon the verdict of a jury rendered in favor of the defendant in an action for personal injuries. Affirmed.

Israel & Mackay and *Vance & Mitchell*, for appellants.
T. N. Allen and *Troy & Falknor*, for respondent.

HADLEY, J.—This cause was once before in this court on appeal, as will appear in *O'Toole v. Faulkner*, 29 Wash. 544, 70 Pac. 58. The judgment was reversed, with instructions to sustain the plaintiff's demurrer to an affirmative answer of the defendant. Upon the return of the cause to the superior court, the remaining issues were tried before the court and a jury. A verdict was returned for the defendant, and judgment entered accordingly. The plaintiff has again appealed.

Reference to the former opinion will show that the action is for personal injuries received by the appellant Margaret O'Toole, through the alleged negligent handling of a street car on the streets of the city of Olympia. The action was brought by Margaret O'Toole, in her own proper person, joined with said Margaret O'Toole as executrix of the last will of E. O'Toole, deceased. At the time of the

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accident, on the 23d day of February, 1900, the said deceased and Margaret O'Toole were husband and wife, and remained such until the 10th day of June, 1900, when the said husband died. After the death of the husband, this suit was brought by the wife to recover for her own injuries. No claim is made for recovery for injuries to the husband, but it is alleged that the damage was to the community. The estate of the husband was evidently joined as party plaintiff on the theory that the proceeds of this suit, if recovery shall be had, will belong to the community. The complaint shows that, a little more than three months after the accident, the community, by the death of the husband, ceased to exist. The damages alleged are chiefly of a permanent and continuing character, because of consequent personal disability of the surviving wife. The only special damages to the community alleged are \$100 paid for medical attendance and treatment at the hospital, and \$50 paid to employ other persons to perform the duties and work of the wife. The community being dead when this suit was brought, it may be doubted if it was such an entirety as could be continued, through an administration, for the purpose of sharing in the proceeds of unliquidated and unrecovered damages for continuing lifetime disabilities of a surviving member. While damages of the last named character comprise the gravamen of the demand in this action, yet the community is interested in the special damages above mentioned, and to that extent, at least, the estate of a deceased person is a party. The pertinence of these comments will more fully appear by what is hereinafter said. It has been suggested by respondent that the action is wholly for the benefit of Margaret O'Toole on account of personal injuries to herself, and that the estate of her deceased husband, although made a nominal party, has

not such an interest as brings the case within § 5991, Bal. Code; § 937, Pierce's Code; which declares the disability of certain persons to testify as to transactions had with deceased individuals. What has been said above will dispose of this feature of the case without further comment, when its applicability becomes more apparent by what follows hereinafter.

The testimony of several witnesses for the defense was to the effect, that the deceased, O'Toole, was riding with his said wife in a wagon drawn by a team, which he was driving; that the team was going northward on Adams street, and had just about crossed the street railway track on Fourth street, which runs east and west; that the horses were turned in a northwest direction on Fourth street, and that they and the wagon occupied the space between the street railway track and the sidewalk on the north; that the said husband was sitting upon the left and his wife upon the right side of the wagon; that at that time an electric street car approached from the west on Fourth street, traveling at the rate of about five miles an hour; that, as the car approached, the team became unmanageable, and while their said driver tried to urge them forward, they began pushing the wagon backward in such a manner that the wheels were thrown across the street railway track in front of the approaching car; that the motorman brought the car to a standstill when it was about twelve or fourteen inches from the wheels of the wagon; that the said O'Toole was thereafter still unable to control his team; that the latter made a lunge, drawing the wheels of the wagon over the fender of the car, which upset the wagon and threw out the occupants, whereby Mrs. O'Toole received her injuries. The evidence of the appellant did not agree with the above, in some es-

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stantial particulars, but such, in any event, was the testimony of respondent's witnesses.

After the injured woman was taken in charge by attendants, the motorman continued with his car to the end of his line. On his return, when he came to the front of the building where the lady was carried from the scene of the accident, he stopped his car and inquired about her condition. At that time and place he had a conversation with Mr. O'Toole, now deceased, who was the driver of the team aforesaid, and the husband of the injured woman. Of that conversation the motorman testified as follows:

"Q. You may tell the conversation you had with Mr. O'Toole. A. When I came back from Puget street, I stopped my car in front of Bates', and the driver was standing on the edge of the sidewalk and I stopped to make inquiry if the lady was hurt much, and how. And he addressed me by saying, 'They tell me that you did not run into me.' I says, 'No, I did not.' He says, 'How did the wagon get upset?' I says, 'Your horses ran the wheel over my fender. If you had held your horses they would not have upset the wagon.' He says, 'If I had got on the other side, where the brake was, I could have held them.'"

Objection was made to the above question, but the same was overruled, and it is here assigned that the court erred in its said ruling. It is contended that the witness, as an employee of respondent, was interested in the result of the suit, in such a degree as to disqualify him from testifying adversely to the estate of the deceased, concerning any conversation had with the deceased. It is urged that the action is based upon the theory of carelessness on the part of the motorman, as respondent's employee, and that, in the event of a decision in the case adverse to the respondent, the motorman must respond to his employer to reimburse him for his outlay by reason of the servant's neg-

ligence. Here it will be observed, from what we have already said, that the estate is such a party to this action as renders the above testimony objectionable, if the witness comes within the disqualifications of the statute hereinbefore cited.

We think, however, that he is not a "party in interest or to the record," who was admitted "to testify in his own behalf," within the meaning of the statute. This view is sustained by the decision of this court in *Sackman v. Thomas*, 24 Wash. 660, 64 Pac. 819. It was there pointed out that a party in interest may testify, but not in his own behalf, and that one not a party to the record cannot be said to testify in his own behalf when he merely testifies to a state of affairs that may collaterally or remotely affect his interest. It was further made clear that, before a witness can be said to testify in his own behalf, his interest must be such as will be bound by the judicial proceeding in which he testifies. Such is not the case with this witness. He was not notified to appear and assist in the defense of the action; he is in no sense a party, and cannot be bound by the result of this suit. The record in this suit cannot be interposed to his prejudice, should an action be brought against him by the respondent. His defense to such a suit upon all questions involved may be made as fully as if this action had never existed. Not being bound by the judgment in this action, then, under *Anderson v. Bigelow*, 16 Wash. 198, 47 Pac. 426, notwithstanding any judgment that may be rendered in this cause, if respondent should hereafter sue the witness, he must prove his cause of action *dehors* the record here. In *Burkman v. Jamieson*, 25 Wash. 606, 66 Pac. 48, the general principle was discussed and applied that one not a party to an action is not concluded by the judgment therein. As particularly

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pertinent to the subject under discussion here, see *Nearpass v. Gilman*, 104 N. Y. 506, 10 N. E. 894; *Perine v. Grand Lodge, etc.*, 48 Minn. 82, 50 N. W. 1022; *Mull v. Martin*, 85 N. C. 406; *Dickson v. McGraw Bros.*, 151 Pa. St. 98, 24 Atl. 1043; *Wormley v. Hamburg*, 40 Iowa 22. The above cases hold that the interest which disqualifies a witness is an interest in the event of the action, and that the true test of interest is that the record will be legal evidence against him in another action. The last case cited also states that, if the interest is of a doubtful nature, the objection goes to the credibility of the witness and not to his competency. We believe the foregoing authorities declare the correct rule, and that the court did not err in admitting the criticized testimony.

It is next assigned that the court erred in refusing to grant the motion for a new trial on the ground of newly discovered evidence. The affidavits in support of the motion do not, however, disclose the discovery of evidence tending to establish any new or independent fact. The discovered evidence is only corroborative of the appellant's testimony, and is therefore merely cumulative. The affidavits disclose that the affiants, in the event of a new trial, would probably testify that the car was not stopped before it reached the wagon, but that, while still moving, it struck the wagon and overturned it. Such, however, was the testimony of appellant. It is a general rule that a new trial will not be granted on the ground of newly discovered evidence, when the new evidence relied upon is merely cumulative of that introduced at the former trial. 8 Am. & Eng. Enc. Law (2d ed.), pp. 472, 473. A very long list of authorities is cited in support of the text above mentioned.

Appellant, however, insists that the above rule as to cumulative evidence does not apply when the newly dis-

covered evidence is corroborative only of that given by a party to the suit. It is contended that it is not cumulative evidence, within the meaning of the rule, unless it is in corroboration of the testimony of a disinterested witness. In their brief counsel cited in blank and discussed a case said to support their contention as above stated, but the actual citation has not been supplied. We have, upon examination, however, discovered the following cases which hold that the rule applies when the testimony, of which the new evidence is cumulative, is that of the party moving for the new trial, as well as when it is that of any other witness introduced by him. *Fox v. Reynolds*, 24 Ind. 46; *Lefever v. Johnson*, 79 Ind. 554; *State v. Hendrix*, 45 La. Ann. 500, 12 South. 621; *Nininger v. Knox*, 8 Minn. 140; *Shute v. Jones*, 24 N. Y. Supp. 637.

Parties in this state may become witnesses, and, when they voluntarily become such, their testimony in the particular here discussed is subject to the same regulations as that of other witnesses. It is said, in some of the above cited cases, that the change of the law which grants to parties the privilege of becoming witnesses has not changed the rule as to cumulative evidence on motions for new trial. A good reason therefor is aptly stated in *Fox v. Reynolds*, *supra*:

"Any other construction would enable a party to experiment by first offering himself as a witness and then, in case the jury disbelieved him, look about with increased diligence for newly discovered *cumulative* evidence."

The court, therefore, did not err in denying the motion for new trial on the ground of newly discovered evidence.

We have discussed the only assigned errors urged by appellant. The judgment is affirmed.

FULLERTON, C. J., and ANDERS, MOUNT, and DUNBAR, JJ., concur.

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[No. 4652. Decided March 17, 1904.]

ROSE GALLAMORE, *Respondent*, v. CITY OF OLYMPIA,
Appellant.¹

MUNICIPAL CORPORATIONS—STREETS—NEGLIGENCE—COMPLAINT—CHARACTER OF PLACE. A complaint for personal injuries sustained through a defect in a sidewalk, which alleges that the same was "constructed, maintained and supervised" by the city in a certain street is sufficient against demurrer whether the sidewalk was in a public street or not; also, because the presumption that all streets are public streets could only be overcome by answer.

SAME—LOCATION OF SIDEWALK IN STREET. An allegation that the sidewalk was on the "north side" of a certain street and that the street was in the city, sufficiently shows that the sidewalk was within the city limits.

SAME—PROOFS ADMITTED WITHOUT OBJECTION. Where proofs admitted without objection showed the sidewalk to be within the city limits, failure to allege the fact is not fatal.

SAME—CONSTRUCTIVE NOTICE OF DEFECT. In an action for personal injuries through defects in a sidewalk, it is a sufficient allegation of the city's notice of the defect to allege facts from which notice to the city could be inferred.

SAME—DEMAND BEFORE SUIT—CLAIM FOR PERSONAL INJURIES. The general statute requiring demands against a city to be filed before suit does not apply to claims for damages for personal injuries.

APPEAL—REVIEW—EXCEPTION TO INSTRUCTIONS—SUFFICIENCY. A general exception to an entire instruction, "and to each and every part thereof" is insufficient if the charge contains several distinct propositions, any one of which is correctly stated.

PLEADINGS—TRIAL AMENDMENT TO INCLUDE DAMAGES FOR PAIN AND SUFFERING. In an action for personal injuries where evidence of plaintiff's pain and suffering was received without objection, under a complaint detailing all the items of damage without any special demand for such damages, the complaint will, upon appeal, be deemed to have been amended at the trial, as that could have been done as of course.

DAMAGES—PROSPECTIVE SUFFERING AND LOSS. In an action for personal injuries an instruction that the jury may take into con-

¹Reported in 75 Pac. 978.

sideration the probable amount of future pain, suffering, and loss which the plaintiff would sustain, does not authorize speculative damages, since that is equivalent to charging that there may be a recovery therefor if they were "reasonably certain."

SAME. Such an instruction would not be erroneous in any event if construed to define the measure of the amount of damages rather than the degree of proof necessary to any recovery.

MUNICIPAL CORPORATIONS — STREETS — NEGLIGENCE — PRESUMPTION AS TO SAFETY OF WALKS. It is proper to instruct that one using a sidewalk of a city with due care may act on the presumption that it is reasonably safe throughout its entire width.

SAME—EVIDENCE—SUFFICIENCY—QUESTION FOR JURY. Testimony of the plaintiff and other witnesses that she fell into an existing hole in the sidewalk is sufficient to make a case for the jury, even if it is contradicted.

SAME—CONSTRUCTIVE NOTICE OF DEFECT. Evidence that a hole in the sidewalk had existed for over a year is sufficient to show constructive notice on the part of the city.

SAME—CONTRIBUTORY NEGLIGENCE OF PEDESTRIAN—PLAINTIFF'S NOTICE OF DEFECT IN SIDEWALK. Where the plaintiff states positively that she did not know of a defect consisting of a hole in the sidewalk over which she had passed prior to the injury, her contributory negligence in using the walk is a question for the jury.

DAMAGES—WHEN EXCESSIVE. A verdict for \$8,040 for personal injuries sustained by reason of a fall through a hole in the sidewalk is excessive, when it is clear that the state of plaintiff's health was due in part to surgical operations, one of which occurred prior to the injury, and which were alone sufficient to account for much of her ill health; and the same should be reduced to \$5,000.

Appeal from a judgment of the superior court for Thurston county, Linn, J., entered June 16, 1903, upon the verdict of a jury rendered in favor of the plaintiff. Affirmed upon the condition of remitting all in excess of \$5,000 and costs.

M. G. Royal, Frank C. Owings, and James A. Haight, for appellant, to the point that it was error to instruct that the plaintiff could recover for "probable" future suffering and expense, cited: *Curtis v. Rochester etc. R. Co.*, 18

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N. Y. 534; *Strohm v. New York etc. R. Co.*, 96 N. Y. 305; *Ford v. Des Moines*, 106 Iowa 94, 75 N. W. 630; *White v. Milwaukee City R. Co.*, 61 Wis. 536, 21 N. W. 524; *Hardy v. Milwaukee City R. Co.*, 89 Wis. 183, 61 N. W. 771; *McBride v. St. Paul City R. Co.*, 72 Minn. 291, 75 N. W. 231.

Troy & Falknor, for respondent.

FULLERTON, C. J.—The respondent, who was plaintiff below, brought this action to recover for personal injuries received by her, as she alleges, from a fall caused by a defect in the sidewalk of the appellant city. At the trial in the court below, a verdict was returned in her favor for the sum of \$8,040, for which sum, together with the costs of the action, a judgment was entered against the city. This appeal is from that judgment.

The appellant first challenges the sufficiency of the complaint. It is objected that the complaint fails to allege that the street upon which the accident happened was a public street, that the sidewalk through which the respondent fell was within the corporate limits of the city of Olympia, that the city had notice of the defect in the walk which caused the injury, or that a claim for the damages sued for was ever presented to the city council of the city of Olympia, for rejection or allowance. But we think there is no merit in any of these contentions.

As to the first, the allegation of the place of the injury is in the following language: "That on the North side of Maple Park, a street within the corporate limits of the said defendant city, and between Franklin and Main streets on said North side of said Maple Park, there is, and was at all times mentioned herein, a sidewalk which was constructed and had been maintained and supervised by said defendant city, through its legally constituted officers and

servants." This, in our judgment, is sufficient to show liability on the part of the city for defects in the walk. If the city assumed jurisdiction over the walk by constructing, maintaining, and supervising it, it is responsible for its safe condition, whether the walk was or was not on a public street. But, aside from this, the omission complained of would not be fatal to the complaint in any event. All streets of a city are presumed, in the absence of a showing to the contrary, to be public streets, and, if it were the fact that the street mentioned was not a public street, the objection could not be raised by a general demurrer, but would have to be taken by answer.

As to the second objection, it is true there is no direct allegation that the sidewalk on which the accident occurred was within the corporate limits of the city of Olympia. In the quotation from the complaint above made, it will be observed that the allegation is that the street named is within the corporate limits of the city, and that the sidewalk is on the north side of the street. To the ordinary mind, however, this conveys the idea that the sidewalk was laid along the north side of the street, and in the street; and if it was, it is of course, within the corporate limits of the city. This we think is good as against a general demurrer, whatever might have been its effect as against a motion to make more definite and certain. But aside from this, proofs went into the record, without objection, that the sidewalk was within the corporate limits of the city, and the case was tried throughout by the city on that assumption. In the light of this fact, it is idle now to contend that the omission would be fatal, even were it true that the complaint did not contain the allegation in question.

As to the allegation of notice on the part of the city, the complaint, instead of alleging directly that the city had

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notice of the defect complained of, stated facts from which such notice would be inferred. This is enough. As proof of constructive notice of the defect causing the injury would sustain a recovery, it is sufficient to allege constructive notice. The allegations need not be stronger than the required proofs.

The last objection on this branch of the case is answered in *Sutton v. Snohomish*, 11 Wash. 24, 39 Pac. 273, 48 Am. St. 847. It was determined in that case that the general statute, requiring "demands" against a city to be presented to the city council for rejection or allowance, did not include claims for damages for personal injuries. This rule has been uniformly adhered to by us ever since, and we think is a correct interpretation of the statute. The demurrer to the complaint was properly overruled.

It is next assigned that the court erred in instructing the jury that they might, when making up their verdict, take into consideration, if they found that the respondent was otherwise entitled to recover, the pain and suffering she had undergone, and might undergo in the future, by reason of her injuries. This contention is founded on the form of the prayer of the complaint. The respondent, after setting out in her complaint in detail the cause and nature of her injuries, and the several ways she had been damaged by reason thereof, demanded judgment for loss of wages, for amount she had paid and contracted for gurney hire, for amounts she had paid and contracted for drugs and medicines, physician's services, hospital charges, and "for damages caused by permanent injuries," but made no special demand for damages caused by pain and suffering. It is argued that because no special demand was made for damages on account of these items the respondent was precluded from recovering therefor, and consequently it was

error for the court to charge the jury that she might so recover.

To this contention there are several answers, the first of which is that the appellant has not properly preserved the question for review in this court. The part of the charge complained of was contained in a paragraph consisting of several distinct propositions, each of which, except possibly the one in question, was free from error. The exception was to the paragraph as a whole, "and to each and every part thereof," but it did not point out to the court the precise matter thought to be objectionable. This was not enough. The rule is general that an exception, taken to an entire charge containing several distinct propositions, is unavailing if any one of the propositions be correct; and the same rule applies where the exception is to a part of a charge which contains in itself more than one proposition. *Lichty v. Tannatt*, 11 Wash. 37, 39 Pac. 260; *Rush v. Spokane Falls & Northern R. Co.*, 23 Wash. 501, 63 Pac. 500; *Blashfield's Instr. to Juries*, § 366; 8 Enc. Plead. & Prac., 258-261. As was said in *Block v. Darling*, 140 U. S. 234, 11 Sup. Ct. 832, 35 L. Ed. 476:

"The general exception 'to all and each part of the foregoing charge and instructions,' suggests nothing for our consideration. It was no more than a general exception to the whole charge. If the trial court's attention had been specifically called at the time to the particular part of the charge that was deemed erroneous, the necessary correction could have been made. An exception 'to all and each part' of the charge gave no information whatever as to what was in the mind of the excepting party, and, therefore, gave no opportunity to the trial court to correct any error committed by it."

This language is peculiarly apt when applied to the exception before us.

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At the trial evidence that the respondent had undergone much pain and suffering, and was destined to undergo much more in the future, was offered and received without objection. Pain and suffering following an injury are elements properly to be considered in estimating damages caused by that injury. The court was, therefore, warranted in assuming that the complaint was as broad as the evidence, and the appellant cannot be permitted to take advantage of that mistake without showing that it called attention to it. The exception as taken failed to do this. It failed even to mention the objectionable part of the charge; much less did it give the reason why it was objectionable. Indeed, had the form of the exception been the result of a studied effort to obscure the real objection, it could not have been framed more happily to secure such a result.

But if the question were properly before us the result would not be different. This particular defect in the complaint was one capable of being amended, and could have been amended at the trial as of course. Amendments which might have been made in the court below on motion will, in the appellate court, be deemed to have been made.

The court instructed the jury that, if they found the respondent was entitled to recover, they might take into consideration, in making up their verdict, the probable amount of pain, the probable loss of time, and the probable amount of expense, she would suffer and be subjected to in the future on account of her injuries. It is objected to this that it left the jury to give damages against the appellant for consequences which were contingent, speculative, or merely possible, while the rule is that damages for future pain and suffering, loss of time, and the like, can only be given when it is reasonably certain that they will ensue as a result of the injury.

Undoubtedly, it would be error for the court to allow the jury to award damages for matters purely speculative, or for those conditions not supported by a preponderance of the evidence, but we think the instruction complained of is far from doing this. The word probable is defined in Webster's International Dictionary, as "Having more evidence for than against; supported by evidence which inclines the mind to believe, but leaves some room for doubt; likely;" and in common acceptation the word implies, when applied to a condition which may be supposed beforehand, that we know facts enough about the condition supposed to make us reasonably confident of it; or, at the least, that the evidence preponderates in its favor. In civil actions it is a general rule, to which there are but few exceptions, that the jury may find according to the preponderance of the evidence. We know of no reason why an exception should be made in this instance, and we do not think the courts applying the term "reasonably certain" to supposed future conditions meant any more than this, but that each of them would have approved an instruction to the effect that the jury might return damages for future pain and suffering if they found, by a preponderance of the evidence, that such pain and suffering would ensue.

However, the charge of the court is not without direct authority in its support. In 1 Sedgwick, Damages, p. 249 (8th ed.), the author, speaking of prospective losses, after stating the rule to be that such losses must be reasonably certain to ensue, uses this language: "This 'reasonable certainty' does not mean absolute certainty, but reasonable probability;" citing *Griswold v. New York Cent. etc. R. Co.*, 115 N. Y. 61, 21 N. E. 726, 12 Am. St. 775, and *Feeney v. Long Island R. Co.*, 116 N. Y. 375, 22 N. E. 402, 5 L. R. A. 544, where it was held not error to permit

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answers to questions put to an expert medical witness concerning the probability of the injured party suffering in the future from his injuries. In *Hamilton v. Great Falls S. R. Co.*, 17 Mont. 334, 42 Pac. 860, 43 Pac. 713, the court said:

"The court charged, among other things, that damages could be awarded for 'such consequences as are *reasonably likely* to ensue in the future;' and again, 'plaintiff may recover for all pain and suffering which she has sustained or in *reasonable* probability will hereafter sustain, etc.' The appellant now contends that damages can only be awarded when it is rendered reasonably certain from the evidence, that damages will inevitably, and necessarily result from the original injury. In this case all testimony as to future disability consisted of expert medical opinions. Certainty of future effects was impossible and reasonable probabilities were necessarily the bases of the opinions expressed. Therefore to say that she could recover for suffering which she would in reasonable probability sustain, was practically to say that she might recover for suffering which she was reasonably certain to sustain. The degree of proof would be the same in either case."

And in Pennsylvania it was held that a charge which told the jury that they might allow for such pain and suffering as the injured person was "likely to suffer" in the future by reason of his injuries was not error. *Scott Township v. Montgomery*, 95 Pa. St. 444. To the same effect is *Illinois Cent. R. Co. v. Davidson*, 76 Fed. Rep. 517; and see, also, *Swift v. Raleigh*, 54 Ill. App. 44; *Kenyon v. City of Mondovi*, 98 Wis. 50, 73 N. W. 314. In some of these cases, it is true, the phrases used were "likely to suffer," "reasonably likely to suffer," and the like, but there can be no distinction in meaning between such phrases and the phrase under discussion.

Counsel for both appellant and respondent have argued the questions pertaining to this instruction as if the court

used the word "probable" with reference to the possibility of the respondent suffering and sustaining losses in the future because of her injuries, and for this reason we have discussed the question with the same thought in view. It has seemed to us, however, after a reading of the entire charge, that it is a misconstruction of the meaning of the court. As we read the charge, the court did not use the word in this connection with the idea of expressing the degree of proof necessary in order to enable the respondent to recover—elsewhere in the instructions it had done that—but used the word rather as a measure of the quantum of her recovery, in case they should find she was entitled to recover at all. The court did not, by this instruction, say that the jury could find for the respondent, if they found that she would probably suffer pain in the future and probably sustain the other enumerated losses, but it charged them to the effect that, if they found by a fair preponderance of the proofs that she would suffer pain in the future, and would be subject to loss of time and expenditures because of her injuries, then the jury could, in estimating her damages, take into consideration the probable amount of pain she would suffer, the probable loss of time, and the probable amount of expense she would be put to in the future on account of such injuries, which, as we say, gives it rather the sense of a measure of quantity than the expression of a possibility. If this be the true meaning of the instruction, it is clearly not erroneous.

It is complained that the court erred in charging the jury to the effect that one, traveling upon the sidewalk or street of a city without notice of any defect therein, has the right, when using due diligence and care, to presume and act upon the presumption that it is reasonably safe throughout its entire width. This instruction is sustained by the case of *Gallagher v. Town of Buckley*, 31 Wash.

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380, 72 Pac. 79, and is, we think, a correct statement of the law.

The appellant challenges the sufficiency of the evidence to support a verdict for respondent. It argues that it does not appear from the evidence that the hole in the walk, into which the respondent fell, was one existing prior to the accident, that it was not shown that the city had knowledge of it prior to that time, and that it does appear that the respondent was guilty of contributory negligence; but on each of these questions we find a substantial conflict in the evidence, and think they were properly submitted to the jury. The testimony of the respondent, and of the woman who accompanied her at the time of the injury, is to the effect that she fell into an existing hole in the walk, and the testimony of other witnesses shows that the holes had been in the walk at that place for something like a year prior to the accident, and that they rendered the walk unsafe for travel. If, therefore, it was necessary to show that the respondent stepped into an existing hole, this evidence was sufficient to make a case for the jury even though contradicted. So, also, the testimony that the unsafe condition of the walk existed for so long a time was proof, sufficient to go to the jury, on the question of the city's knowledge of the defect; it was evidence of constructive notice, and constructive notice is sufficient. The only thing we have discovered in the record indicating contributory negligence was the fact that the respondent passed over the walk prior to the injury, and, for that reason, may have known of the existing holes. Her testimony, however, was positive to the effect that she did not know of them. This made it a question for the jury.

The other errors assigned, save the one next to be noticed, we think hardly merit separate consideration. Indeed some of them are passed over by the appellant with nothing more

than their mere mention. Suffice it to say, therefore, that we have examined them with care, and find nothing that requires a reversal of the judgment rendered.

Lastly, it is contended that the judgment is excessive, and with this contention we are inclined to agree. Doubtless the appellant was, at the time of the trial, in so far as her state of health was concerned, in a somewhat pitiable condition, but the evidence makes it clear that this was not entirely the result of her injury. She had been subjected to two surgical operations, each of which was capital in its nature. One of these occurred prior to the time of her injury, and of course could in nowise be traceable thereto. The second occurred some little time after, and it is doubtful at best whether the condition necessitating it was the result of, or only aggravated by, the injury. The condition of the body necessitating these operations were alone sufficient to account for much of her ill-health, and it appears to us that the jury, in making up their verdict, may not have very carefully segregated the conditions for which the city could be held responsible from those for which it could not. For these reasons we have decided to reduce the judgment to five thousand dollars.

The order of the court will be, therefore, that if the respondent, within thirty days from the time of the filing of this opinion, will remit from the judgment all in excess of the sum of five thousand dollars and the costs taxed in the court below, the judgment will stand affirmed for those sums, otherwise the judgment will be reversed, and a new trial granted. In case the remission is made, neither party will recover costs in this court. If not so made, costs of this court will go to the appellant.

DUNBAR, HADLEY, MOUNT, and ANDERS, JJ., concur.

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[No. 4530. Decided March 19, 1904.]

AMERICAN PAPER COMPANY *et al.*, Appellants, v. J. P.
SULLIVAN, Respondent.¹

EXEMPTIONS—PRINTING PRESS AND TOOLS—FAILURE TO DEMAND APPRAISEMENT—RELEASE OF EXECUTION. Where, upon the levy of an execution upon a printing press and printing outfit, duly claimed by the head of a family, a job printer, as exempt as his tools and instruments of trade, the plaintiff does not demand an appraisalment, it is the duty of the officer to release the levy.

SAME—RELEASE OF EXECUTION—MANDAMUS—REMEDY IN ORIGINAL ACTION—SUBMISSION TO JURISDICTION. Where an officer refuses to release exempt property levied on under execution, and the defendant applies to the court in the original action for an order of release by the filing of an affidavit sufficient in all particulars for a mandamus, an appearance by the plaintiff asking a dismissal, or in the alternative for a continuance of the hearing, which was granted, submits the matter to the jurisdiction of the court in the original action and after contesting the matter at the hearing as in the case of mandamus proceedings the plaintiff can not claim that the only remedy was by mandamus.

Appeal from an order of the superior court for Chehalis county, Irwin, J., entered August 12, 1902, after a hearing before the court upon affidavits, ordering the sheriff to release property from a levy as exempt. Affirmed.

J. C. Cross, for appellants.

John C. Hogan, for respondent.

HADLEY, J.—It has been made to appear to this court that the respondent, J. P. Sullivan, died during the pendency of this appeal, and that Laura W. Sullivan has been appointed by the superior court of Chehalis county administratrix of the estate of said deceased. It further appears that said administratrix has filed a petition herein, praying that she be substituted as party respondent in this action,

¹Reported in 75 Pac. 991.

and, the attorneys of the respective parties having stipulated that such substitution may be made without notice, it is therefore hereby ordered that said administratrix be, and she is hereby, substituted as such party respondent.

Judgment was obtained by the appellant American Paper Company against the respondent, J. P. Sullivan, in the superior court of Chehalis county. Thereafter, on the 19th day of July, 1902, the said appellant caused an execution under said judgment to be levied upon a certain printing press and printing outfit, belonging to said respondent. On the 24th day of the same month, said respondent filed an affidavit in the cause in which the judgment was rendered, stating that he was a householder, the head of a family consisting of himself, a wife, and three children, with whom he resided in said county; that he was a mechanic, a job printer by trade, and that all of the personal property so levied upon was, at the time of the levy, in actual use by him as the tools and instruments for carrying on his said trade for the support of himself and his family; that, after said levy was made, the said respondent delivered to the officer making the levy a verified itemized list of all personal property owned by him; that he also delivered to the officer a list of separate items of property claimed by him as exempt; that the claim for exemption was ignored, and that the appellant American Paper Company made no demand for an appraisement; that the officer informed said respondent and his attorney that the said appellant would not demand an appraisement; that the officer refused to release the property, and was proceeding to sell the same. The affidavit concluded with a prayer that the court should make an order directing the sheriff to release the property from the levy, and deliver possession to said respondent. Accompanying the affidavit, and filed with it, was a motion asking the court

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to make an order directing the sheriff, his deputy, and the appellant American Paper Company to show cause on the following day why the sheriff should not be ordered to release said property from said levy as exempt. Such an order was made.

At the time fixed the sheriff, his deputy, and the said American Paper Company appeared by counsel, and moved for an order vacating the order to show cause. The motion, however, stated that, if the requested vacation should be denied, then, in that event, they move the court for an order continuing and extending the time for making return to the order to show cause for a period of ten days. The vacation of the order to show cause was denied, but the continuance was granted, and separate returns were thereafter made. The returns admitted the refusal to release the property from the levy, and also that no appraisalment was demanded. Upon a hearing the court found that the property was exempt, and that the said respondent had claimed the same as exempt in the manner provided by law. The sheriff was ordered to release the property, and this appeal is from that order.

No appraisalment having been demanded by the execution creditor, the debtor was entitled to the release of the property claimed as exempt. § 5255, Bal. Code; *State ex rel. Hill v. Gardner*, 32 Wash. 550, 73 Pac. 690; *Messenger v. Murphy*, 33 Wash. 353, 74 Pac. 480.

It is claimed by appellants that the court had not jurisdiction to order the release in this proceeding. In the cases above cited, and also in an earlier case—*State ex rel. Achey v. Creech*, 18 Wash. 186, 51 Pac. 363—this court held that mandamus is a proper remedy to procure the release of property under such circumstances. As we have seen, the procedure here was begun by the filing of the affidavit in the original case. An order to show cause fol-

lowed, and to that order an appearance was made. Under the appearance a motion in the alternative was made that the order be vacated, or that further time be granted for return thereto. Upon the granting of the latter alternative, returns were made, a hearing was had, evidence was taken, and the procedure in all essential particulars excepting name was that of mandamus. The procedure was begun by an affidavit, which in all particulars would have served the purposes of a mandamus suit, even if it had been so called, and, by the alternative request of appellants, they invited the adoption of procedure in the nature of mandamus. To properly insist now that the court had not jurisdiction, under the motion in the original action, would have necessitated standing upon objections to that motion, rather than to have voluntarily invited the procedure which was followed to the end. We think the course pursued was a submission to the jurisdiction of the court for the determination of the controversy.

Respondent insists that the court had the power to make the order for release, even under the mere motion in the original action, by reason of the principle that there is inherent power in every court to supervise the conduct of its officers and the execution of its judgments and processes. It is unnecessary to pass upon that contention now, however, and we do not do so, since, for the reasons already stated, we think the court did not err in its disposition of the case.

The judgment is affirmed.

FULLERTON, C. J., and ANDERS and MOUNT, JJ., concur.

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[No. 4927. Decided March 21, 1904.]

STATE OF WASHINGTON, *Respondent*, v. LOUIS H. GARBE,
Appellant.¹

CRIMINAL LAW—INFORMATION—BURGLARY—ATTEMPT TO COMMIT—DISTINGUISHED FROM POSSESSION OF TOOLS WITH INTENT. An information charging accused with an attempt to commit the crime of burglary "having in his possession" certain implements of burglary, charges a felony under Bal. Code, §7437 relating to attempts, and not merely the misdemeanor defined by Bal. Code, §7106, in having such implements in possession with intent to commit such offense, since an attempt is charged as distinguished from mere intent, and the latter section expressly applies only where the circumstances do not amount to an attempt; and the allegation respecting possession of tools is surplusage.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered May 28, 1903, upon the plea of guilty of the crime of attempting to commit burglary. Affirmed.

Hurd & Brickey, for appellant.

J. C. Waugh, for respondent.

DUNBAR, J.—On the 12th day of May, 1903, an information was filed against appellant in the superior court of the state of Washington, Skagit county. Omitting the formal parts, it was as follows:

"Then and there being, Lewis H. Garbe, in the night time and having in his possession implements of burglary, namely, a bit, a brace, and a keyhole saw, did attempt to commit the crime of burglary on the 26th day of April, 1903, in the city of Anacortes, county of Skagit, state of Washington, by unlawfully and feloniously attempting to break and enter into a certain store building of the Anacortes Mercantile Company, a corporation, in which goods,

¹Reported in 75 Pac. 993.

wares and merchandise are kept for sale, with intent to commit a felony or misdemeanor therein."

Thereafter, on the 25th day of May, 1903, the appellant was duly arrested under said information, and pleaded guilty thereto. One of appellant's counsel thereupon suggested to the court that the information charged a misdemeanor and not a felony, and that sentence should be imposed as for a misdemeanor and not as for a felony; whereupon the court overruled appellant's contention, and sentenced him to two years at hard labor in the state penitentiary; to all of which appellant excepted. Judgment was entered upon said plea.

The question presented here is, does the information, under the law, charge any offense greater than a misdemeanor? It is contended by the appellant that the information was drawn under § 7106, Bal. Code, and that the penalty cannot be other than the penalty provided for in such section. Section 7106 is as follows:

"If any person shall be found at night around (armed) with any dangerous instrument or offensive weapon whatsoever, with intent to break or enter into any dwelling house, building, room in a building, cabin, stateroom, railway car or other covered inclosure where personal property shall be, and to commit any larceny, felony or misdemeanor therein, or with the intent to commit any larceny, felony or misdemeanor, or if any person shall at any time be found having in his possession any picklock, crow, key, bit, jack, jimmy, nippers, outsiders, pick, drill punch, betty or other implement or implements of burglary, with the intent aforesaid, and under such circumstances as shall not amount to an attempt to commit felony, every such offender shall be deemed guilty of a misdemeanor."

But we think the appellant is mistaken in concluding that the information was drawn under this section; on the other

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hand, the crime charged falls within the provisions of § 7437, which provides that:

“Every person who attempts to commit any crime but fails or is prevented or intercepted in the perpetration thereof, is punishable, when no provision is made by law for the punishment of such attempt, as follows: (1) If the offense so attempted is punishable by imprisonment in the penitentiary for five years or more, or by imprisonment in the county jail, the person guilty of such attempt is punishable by imprisonment in the penitentiary or in the county jail, as the case may be, for a term not exceeding one-half of the longest term of imprisonment prescribed upon a conviction of the offense so attempted;”

It was the evident intent of the pleader in this case to charge the appellant, not alone with an *intent* to commit the crime of burglary, which is the misdemeanor contemplated in § 7106, but with an *attempt* to commit the crime of burglary. It is true that the compiler's head note to § 7106 is, “Attempt to Commit Burglary, Possession of Tools, etc.,” but the section itself does not, as it will be seen, provide that an attempt to do certain things shall be considered a misdemeanor, but only the intent, as distinguished from an attempt; for the latter part of the section provides, “and under such circumstances as shall not amount to an attempt to commit felony, every such offender shall be deemed guilty of a misdemeanor;” while the information in this case plainly charges the appellant with an attempt to commit the crime of burglary, by unlawfully and feloniously, in the night time, attempting to break and enter, etc. It is true that, according to the recitals of the information, the appellant at the time of the attempt had in his possession implements of burglary, viz., a bit, a brace, and a keyhole saw; but the statement of this fact was purely surplusage on the part of the pleader, and at the most could be but presumptive evidence of an intention

to commit the crime charged, viz., an attempt to commit burglary.

We think the appellant was properly sentenced, and the judgment is affirmed.

FULLERTON, C. J., and HADLEY, MOUNT, and ANDERS, JJ., concur.

[No. 4969. Decided March 21, 1904.]

MARY BERGMAN, *Respondent*, v. LONDON & LANCASHIRE
FIRE INSURANCE COMPANY, *Appellant*.¹

PLEADINGS—AMENDMENTS—SETTLEMENT—DENIAL OF PAYMENT IN FULL NOT INCONSISTENT WITH ALLEGATION OF PAYMENT UNDER DURESS. Where an answer sets up a payment of \$500 in full settlement of an insurance loss, a reply presenting a plain statement of facts to the effect that the payment was made under duress, denying that it was accepted as a compromise or in any way except on account, is not inconsistent with a general denial of the allegations in the answer respecting the settlement, and no prejudice is sustained by allowing a verbal amendment at the trial adding such general denial to the reply.

TRIAL—RE-OPENING CASE AFTER CLOSE OF TESTIMONY—DISCRETION. It is not reversible error to re-open the case after defendant had closed, for the purpose of allowing plaintiff to introduce further evidence, where no abuse of discretion is shown, and the defendant was allowed, and availed itself of, the same privilege.

Appeal from a judgment of the superior court for King county, Albertson, J., entered May 19, 1903, upon the verdict of a jury rendered in favor of the plaintiff. Affirmed.

Granger & Heifner, for appellant.

Leroy V. Newcomb and *R. W. McClellan*, for respondent.

¹Reported in 75 Pac. 989.

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DUNBAR, J.—This is an action brought to recover a balance claimed to be due under a policy of insurance issued by appellant to respondent. Issues are presented by an amended complaint, answer, reply, and a verbal amendment to the reply. The case was tried by a jury, and the verdict and judgment were in plaintiff's favor for \$500. Inasmuch as the main contention in this case is that the reply presents inconsistent defenses to the affirmative allegations of the complaint, it will be necessary to a correct understanding of the case to set out the pleadings at some length. The answer, after making some immaterial admissions, and denying the allegations of the complaint that the defendant had not paid the amount due the plaintiff upon the policy, and that there was \$500 due thereon, for further answer, and by way of affirmative defense, alleged:

“(1) That after the occurrence of the alleged fire referred to in said amended complaint, the plaintiff claimed to and from the defendant the full amount insured by said policy; and the defendant believed and in good faith contended that it was not liable for any sum under said policy by reason of said loss; and that thereupon, for the purpose of compromising and settling the said dispute, and to the end that litigation might be avoided, the plaintiff and the defendant settled and adjusted all of the rights of the plaintiff and the liability of this defendant under and by virtue of the policy and the said loss sued upon in this cause, whereby the said defendant agreed to pay to the plaintiff, and the plaintiff agreed to receive from the defendant, the sum of \$500 in full settlement of all liability of this defendant to this plaintiff under and by virtue of the policy and alleged loss sued upon in the plaintiff's amended complaint in this cause.

“(2) That on or about September 25, A. D., 1901, in pursuance of said agreement and settlement, the defendant paid to and the plaintiff received from the defendant the sum of \$500 in full settlement of all liabilities of this

defendant by reason of the facts alleged in the plaintiff's amended complaint in this cause."

The following reply was interposed to this affirmative defense:

"(1) Replying to paragraph 1 of said affirmative defense, plaintiff says that on or about the 25th of September, 1901, this defendant by its agent Sam B. Stoy did falsely represent to this plaintiff herein that it would settle and pay the amount of the policy referred to in plaintiff's complaint herein; that the plaintiff believing that the defendant herein would pay the policy as promised accompanied the said Sam B. Stoy, agent of the defendant herein, to a room in a certain hotel, to wit, the Hotel Butler in the city of Seattle, where the said Sam B. Stoy acting as the agent of the defendant herein did keep this plaintiff confined in the room aforesaid for a long time, and until said plaintiff became weak, faint, and sick and did by the use of violent threats and profane and abusive language so overpower, frighten and intimidate the said plaintiff as to deprive said plaintiff of the control of her senses and render plaintiff incapable of acting freely and voluntarily; and that while said plaintiff was thus overpowered by fear and fright, which fear and fright was the direct result of the aforesaid confinement, violent threats, and abusive language on the part of the said Sam B. Stoy, agent of defendant herein, did accept the sum of \$500 upon the policy aforesaid; that the acceptance of the said \$500 was the direct result of the fear and fright aforesaid; that the defendant herein did thus by the use of duress, fraud and undue influence induce this plaintiff to accept the sum of \$500 upon the aforesaid policy; that the plaintiff herein did not accept the sum of \$500 as full payment of the said policy freely and voluntarily, but accepted the same on account and because of the aforesaid duress, fraud and undue influence exercised upon her by the defendant herein. Plaintiff denies each and every allegation in said paragraph 1 of defendant's affirmative defense except that the plaintiff claimed to and from the defendant the full amount insured by said policy.

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"(2) Replying to paragraph 2 of said affirmative defense set out in defendant's amended answer herein, the plaintiff denies that she received the sum of \$500 on or about the 25th day of September, 1901, in full settlement of all liability of the defendant by reason of the facts alleged in the plaintiff's amended complaint herein; and alleges that the \$500 was received on account, and because of the aforesaid duress, fraud and undue influence practiced by the said defendant upon the plaintiff herein."

And, after the opening of the case, the court allowed the plaintiff to amend its reply by adding the following:

"That plaintiff denies each and every allegation by the defendant made in said paragraph except that the plaintiff claimed to and from the defendant the full amount insured by said policy."

It is insisted by the appellant that, by this amendment, plaintiff was permitted to change the entire scope of her case; that up to this time plaintiff was admitting that a settlement had been made, and that the plaintiff had received \$500 in full settlement of the loss, but by this denial she was permitted, after the trial had commenced, to deny all of these material facts; that such a denial, even if permissible at the proper time, should not have been permitted after the jury had been impaneled; and that the amendment, together with the reply, constituted inconsistent defenses to the affirmative matters set forth in the answer, and should not have been permitted under the rule announced by this court in *Seattle Nat. Bank v. Carter*, 13 Wash. 281, 43 Pac. 331, 48 L. R. A. 177. In that case it was held that, where an allegation of general denial in an answer is followed in an affirmative defense by a special averment of the truth of the matter which had been denied, the defenses are so inconsistent that they cannot stand together, and that plaintiff will

not be compelled to establish the truth of the allegation in his complaint, to which such defenses are set up.

But it does not seem to us that this case falls within the rule announced by this court in the slightest degree. So far as the amendment offered and allowed by the court is concerned, a reference to the statement of facts, and the colloquy indulged in between the court and counsel, shows that it was simply an attempt on the part of the plaintiff to make plain that which had already been made plain by the allegations in the reply. A long amendment to the reply had been presented by counsel for the plaintiff, which was objected to by the court for the reason that it was so lengthy that the court could not keep in mind the relation it bore to the reply which it sought to amend, the plaintiff in answer to this objection saying:

"It is simply a direct denial of what the defendant alleged in its answer. Your Honor said yesterday it seemed that we didn't specifically deny these allegations. The Court: Why don't you specifically deny it then? Mr. McClellan: We are denying it; that is what I am doing right now—simply denying what the defendant alleges in its answer. I am using defendant's answer to deny what it alleges. You will see by referring to defendant's affirmative answer, the matters that I have denied, set out almost *verbatim et literatim*."

And, after considerable talk with the court, the counsel again said:

"I want to bring in a general denial of these allegations, except what he admits—that we claimed the full amount. That is the purpose that I am offering this amendment now for to that paragraph of the defendant's answer. And we desire to amend the second paragraph of plaintiff's reply. . . . The Court: Well, why don't you—it seems to me that the amendment will be complete, and such as you desire, if you added that it denied each and every other allegation in said paragraph one contained,

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except that plaintiff admits that she did claim the full amount."

And that was accepted, and another amendment offered to the second paragraph in the affirmative answer, which amendment was denied by the court, and properly denied, because the allegations of the reply had already denied every material allegation of the affirmative allegations of the answer. It seems to us that there was no admission in the reply that there had been any settlement wherein \$500, or any other sum, had been accepted in full payment of the policy. The reply simply presented a plain statement of facts, to the effect that, by reason of the violent threats, profane and abusive language, etc., the plaintiff was so overpowered, frightened, and intimidated as to deprive her of the use of her senses and to render her incapable of acting freely and voluntarily, and that, while in this condition, she accepted the sum of \$500 simply as the direct result of fear and fright; but constantly, and in terms, denied that the said sum of \$500 was accepted as a compromise, or in any other way than on account. And, if the statements in the reply are true, and the \$500 was paid under the circumstances therein alleged, it must have been paid on account and could not have been paid in accordance with an agreement to compromise. Paragraph 2 of the reply is simply a repetition of the allegations of paragraph 1, in an attempt by the pleader to answer separately the separate allegations made by the answer, separating the agreement itself from an agreement to agree. In *Seattle Nat. Bank v. Carter*, *supra*, this court said, after announcing that, if inconsistent allegations were allowed, inconsistent proofs could be submitted under them:

"This theory carried to its logical result would permit a defendant who was sued upon a promissory note to al-

lege non-execution, want of consideration, and payment. Under such allegations he would be permitted to swear that he never executed the note; that he *did* execute the note, but that it was without consideration; and that he *did* execute the note, that the consideration *was* good, and that he had paid the same,"

stating that such a practice as this would not only be farcical, but absolutely wrong and immoral and an encouragement of perjury. But we are unable to see how an instance of the kind cited there could be made to apply to the pleadings in this case, where it is stoutly denied, from beginning to end, that the \$500 was accepted under an agreement of compromise. Nor do we think that any prejudice was sustained by the appellant by the allowance of the amendment complained of at the time that it was allowed.

The appellant also complains that the court abused its discretion in permitting plaintiff to reopen her main case after defendant had closed its case, and offering testimony in relation to the value of the property consumed by fire. But, in addition to the fact that it does not appear to us from the record that the court abused its discretion in this respect, or that the appellant was in any manner prejudiced thereby, the same latitude was offered in the trial of the case to the appellant, who availed itself of the opportunity presented in this respect. On page 162 of the statement of facts the following occurs:

"Mr. Granger: In view of the fact that the plaintiff's case was reopened for further testimony, the defendant now offers the testimony to be taken of the witness Mr. Brown, as a part of its defense, on the defense to the matters and things brought out by the plaintiff. The Court: The case was only reopened with regard to the particular question of the value of the personal property covered by the insurance; the testimony was directed to that single

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point. Mr. Granger: I think this goes to that. The Court: If it does, of course it would be proper in rebuttal. Mr. Granger: If it doesn't, then I will ask the same privilege that plaintiff had, to go into any subject I want to; but I will treat this, for the present, as meeting the testimony offered upon the reopening of the case. The Court: Very well."

And the testimony was accordingly admitted. Again, upon page 168, the following occurs:

"The Court: Anything further for the defense? Mr. Granger: I believe not—although this case has begun to take a course that there might be something I have omitted by oversight. As far as I can now recall there is nothing. The Court: I would be glad if counsel would consider the case, and get in their testimony now, the doors having been opened once, the case must be concluded some time. If there is any matter in the way of testimony in chief which counsel desires to offer at this time, the court having permitted the plaintiff to reopen the case, will be called upon to extend the same indulgence to the defense, but I do not feel that the door should be kept open indefinitely. Mr. Granger: We rest."

So that it appears from the whole record that, in the interest of justice, liberal latitude was allowed by the court to both parties to the action.

We have examined the instructions and think that they comprise a fair presentation of the law of the case. The case was tried without error, and judgment is therefore affirmed.

FULLERTON, C. J., and HADLEY, MOUNT, and ANDERS, JJ., concur.

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389 213

[No. 4995. Decided March 21, 1904.]

NANCY A. MANNING, *Appellant*, v. TACOMA RAILWAY &
POWER COMPANY *et al.*, *Respondents*.¹

DEATH BY WRONGFUL ACT—RIGHT OF ACTION—HEIRS LIMITED TO WIDOW AND MINOR CHILDREN—STARE DECISIS. The supreme court having six years ago adopted a construction of the statute respecting damages for a death by wrongful act whereby "heirs" entitled to bring the action was held not to include collateral heirs but only the widow and children, and having since adhered to the rule, and the legislature having since convened three times without making any change, the question should be considered at rest and the rule adhered to, notwithstanding that, as an original proposition, the court, as now constituted, would probably have adopted a different construction.

Appeal from a judgment of the superior court for Pierce county, Huston, J., entered October 17, 1903, upon sustaining a demurrer to the complaint, dismissing an action for damages for the death of plaintiff's son. Affirmed.

Stiles & Doolittle, for appellant.

B. S. Grosscup and *A. G. Avery*, for respondents.

HADLEY, J.—This action was brought by appellant to recover damages on account of the death of her son. The complaint avers that the death was due to the negligence of the respondent railway company, and of its co-respondent, who was the motorman of one of its cars at the time of the accident which resulted in said death. It is also alleged, that the deceased was an unmarried man, of the age of twenty-seven years, and in good health; that he was able to earn, and did earn, \$75 per month at his occupation of hotel clerk; that there has been no administration of his estate, and that the plaintiff is his sole heir, his father

¹Reported in 75 Pac. 994.

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having died before him; that plaintiff is fifty-three years of age, and has not sufficient means for her support; that she is, and for a long time has been, dependent upon her sons, of whom she had three, for her support and maintenance; that said deceased son contributed largely to her support, and would have continued so to do while he and plaintiff both lived. Separate demurrers to the complaint were interposed by the defendants in the action. One of the stated grounds of demurrer is that the complaint does not state facts sufficient to constitute a cause of action. The demurrers were sustained. The plaintiff elected to stand upon her complaint, and refused to plead further. Judgment was thereupon entered dismissing the action. The plaintiff has appealed.

It is conceded by counsel that the court below sustained the demurrers on the authority of *Noble v. Seattle*, 19 Wash. 133, 52 Pac. 1013, 40 L. R. A. 822, in which this court held that no action lies for the death of an adult unmarried person. It is frankly stated that this appeal is prosecuted with the purpose of asking a reinvestigation of the question decided in the above-named case, to the end that the same may be overruled. No right of recovery in the premises exists at common law, and, if there be such right, it must be by virtue of a statute. Different statutory provisions bearing upon this subject were collected together and placed in one section in the Code of 1881, as section 8 thereof, and the same also appears in § 4828, Bal. Code. In the case above cited it was held that the word "heirs," as used in said section, does not include parents or collateral relatives, but includes only the widow and children of the person whose death is caused by the wrongful act of another.

Counsel for appellant in this case ably review the history of these statutes, and earnestly insist that the construction

announced in *Noble v. Seattle* was erroneous, and should be overruled. It is also contended that this court had recognized a different rule in prior cases. However that may have been, a direct and unmistakable construction was adopted in that case. The opinion was filed March 24, 1898. It has for six years stood as the adopted construction, and as the rule of decision upon the subject in this state. A little more than two years later, on May 24, 1900, the same question was again decided in *Nesbitt v. Northern Pac. R. Co.*, 22 Wash. 698, 61 Pac. 141. But little is said in that opinion, yet the question presented was identical with that in *Noble v. Seattle*. We have examined the appellant's briefs in that appeal, and find that able counsel elaborately and comprehensively covered the same ground as to our statutory history, and the Kentucky statutes and decisions, and otherwise carefully placed before this court the same argument that is now also skillfully and vigorously invoked by counsel for this appellant. Notwithstanding the earnest and forceful argument in that case, the court deemed it unnecessary to discuss the subject further than to say that it adhered to the ruling in *Noble v. Seattle*. In view of the fact that the court then declined to reopen the subject, and that the criticized construction has stood for six years as a rule of decision, we think we should not now disturb it. It is furthermore a fact that, since the construction was first announced, three regular sessions of the state legislature have been convened, and no change in the statute has been made. It may be reasonably assumed that the legislative department has acquiesced in the construction of the statute as being correct, or it would have made its meaning known by more definite and unmistakable expression.

We think it proper to say that, as this court is now constituted, if the question were now here as one of original

statutory construction, it is not improbable that a different construction would be adopted. But a mere change in the personnel of the court should not be treated as justification for overruling former decisions, even though the individual judges may think that they were erroneous. Such a course would lead to the expression of mere opinionated, individual views, whereas the decisions of an appellate tribunal, which have been long followed and regarded as establishing rules governing property and personal rights, concern the people of an entire state, and should not ordinarily be subject to disturbance by either a change in the membership of the court, or by change of individual views. We believe, therefore, that the subject urged upon this appeal should now be considered as at rest, unless the legislative department shall clearly express a different rule.

The judgment is affirmed.

FULLERTON, C. J., and DUNBAR, MOUNT, and ANDERS, JJ., concur.

[No. 4948. Decided March 21, 1904.]

THE STATE OF WASHINGTON, *Respondent*, v. GEORGE W. YANDELL, *Appellant*.¹

APPEAL—RECORD—AFFIDAVITS, HOW BROUGHT UP. Affidavits in support of a motion for a new trial will not be considered on appeal unless embodied in a bill of exceptions or statement of facts.

SAME—STATEMENT OF FACTS—SERVICE BEFORE FILING. A statement of facts served before it is filed is not a compliance with the law and can not be considered.

SAME—TIME OF FILING. A statement of facts must be filed within thirty days from the date of the judgment, where no extension of time is given, or it can not be considered.

CRIMINAL LAW—MURDER—INFORMATION—SUFFICIENCY. An information charging in the language of the statute that the accused

¹Reported in 75 Pac. 988.

purposely and of his deliberate and premeditated malice killed the deceased by purposely, etc., shooting and mortally wounding him with a pistol, is sufficient to sustain a conviction of manslaughter.

Appeal from a judgment of the superior court for Okanogan county, Martin, J., entered May 18, 1903, upon a trial and conviction of the crime of manslaughter. Affirmed.

E. Fitzgerald, for appellant.

E. K. Pendergast, for respondent.

DUNBAR, J.—On March 28, 1903, an information was filed by the prosecuting attorney of Okanogan county, charging defendant with murder in the first degree. On April 9 defendant was arraigned, and on April 10 his plea of not guilty was entered. He was brought to trial on the regular May term of said court, and upon the 15th day of May, 1903, the jury brought in a verdict finding him guilty of manslaughter. On May 18, 1903, he was sentenced to the penitentiary for a term of four years. From that judgment this appeal was taken.

Respondent moves to dismiss this appeal for the reasons, that the appellant's brief was not filed within the time required by law, and that no extension of time for the service or filing of said brief had been given by the court, nor by stipulation, nor otherwise, nor at all; that no statement of facts had been served within the time required by law, or at all, and that no statement of facts has been certified to this court at all; that no notice has been given at any time of the time or place when application would be made for the settlement of any statement of facts, as required by law, or at all; and for various other reasons which it is not necessary to notice, for the fact appears that no statement of facts has been certified to this court. A supplemental transcript, embodying certain affidavits,

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has been filed by the appellant in this case, but the affidavits cannot be considered here for the reason that they have not been certified as a part of the record of the case. This has been the uniform ruling of this court. Affidavits in support of a motion for new trial will not be considered on appeal when not embodied in a bill of exceptions or a statement of facts. *Shuey v. Holmes*, 27 Wash. 489, 67 Pac. 1096. It appears that the only proposed statement of facts that has at any time been served or filed in this action was served on the 17th day of July, 1903, and not filed until the 20th day of July, 1903. This is not in compliance with the requirements of law, under the rule announced in *Erickson v. Erickson*, 11 Wash. 76, 39 Pac. 241, where it was said:

"In contemplation of law there can be no statement of facts in a case until it has been properly filed therein, and no valid service of a statement can be made by copy until the original has been filed. In other words, service cannot precede the filing of the statement. . . . We think, therefore, that the statement of facts was not served as provided by law."

The same rule was announced in *Boyle v. Great Northern R. Co.*, 13 Wash. 383, 43 Pac. 344, and *Barkley v. Barton*, 15 Wash. 33, 45 Pac. 654. But, in any event, there was no proper statement of facts proposed, for the judgment was rendered on May 18, 1903, and the statement of facts was not served until the 17th of July, 1903, or filed until the 20th of July, 1903. The law provides that the statement of facts must be filed and served within thirty days from the date of judgment, unless an extension of time is granted by stipulation or order of the court. *State v. Landes*, 26 Wash. 325, 67 Pac. 72; *Wollin v. Smith*, 27 Wash. 349, 67 Pac. 561.

There being no statement of facts here, the only question that can be raised, under the assignments made by appellant under his motion in arrest of judgment, is that the facts stated in the information do not constitute a crime or misdemeanor. The material part of the information is as follows:

"Comes now E. K. Pendergast, county attorney and prosecuting attorney in and for Okanogan county, state of Washington, and by this information does accuse one George W. Yandell with the crime of murder in the first degree, committed as follows, to wit: He, the said George W. Yandell, in the county of Okanogan, state of Washington, on the 11th day of March, A. D. 1903, purposely and of his deliberate and premeditated malice, killed Fred Starrett, by then and there purposely and of his deliberate and premeditated malice shooting and mortally wounding the said Fred Starrett with a pistol (revolver) which he, the said George W. Yandell, then and there held in his hand."

In addition to the fact that it would seem that no legal objection could be raised to an information of this character, this court has passed upon an information drawn in exactly the same words, with the exception of dates and the names of the combatants, in *State v. Cronin*, 20 Wash. 512, 56 Pac. 26, where the information was sustained, and the court, after citing numerous cases in which this character of information had been sustained, said:

"The attacks so repeatedly made upon this form would seem to indicate that this court's conclusions had not met with the entire approval of the bar; but to reverse our former holdings now would entail such grave consequences that such a course is not to be considered, and we must insist that the question is no longer an open one."

The judgment is affirmed.

HADLEY, MOUNT, and ANDERS, JJ., concur.

FULLERTON, C. J., concurs in the result.

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Syllabus.

[No. 4834. Decided March 21, 1904.]

CITY OF PORT TOWNSEND, *Respondent*, v. SOLOMON LEWIS
et al., *Appellants*.¹

34	413
37	670
38	108
38	363
34	413
42	54
142	160

PLEADINGS—WAIVER BY PLEADING OVER. A motion to strike portions of a complaint or to make it more definite is waived by pleading over and going to trial on the merits.

APPEAL—REVIEW—HARMLESS ERROR. Error in the admission of evidence in an action to recover possession of real estate tried before the court upon waiving a jury, is harmless since the supreme court tries the case *de novo* on appeal.

APPEAL—REVIEW—HARMLESS ERROR—WAIVER OF NONSUIT BY GOING TO TRIAL. In an action tried before the court without a jury, a motion for a nonsuit is waived by going on with the trial.

MUNICIPAL CORPORATIONS—STREETS—EJECTMENT—COMPLAINT—OWNERSHIP OF STREET. A city may maintain an action of ejectment to recover possession of a portion of a public street, under the statute giving it the control thereof, and the complaint is sufficient without any allegation of ownership where it is alleged that it is a public street.

TRIAL—CROSS-EXAMINATION RESPECTING AFFIRMATIVE DEFENSE—HARMLESS ERROR. Error can not be predicated upon the exclusion of cross-examination of plaintiff's witnesses respecting defendant's affirmative defense, especially when the matter was subsequently established without contradiction.

ADVERSE POSSESSION—TIDE LANDS—APPLICATION TO PURCHASE FROM STATE—CLAIM NOT ADVERSE. Adverse possession of a public street across tide lands for ten years is not shown where during the period the claimants were contesting with the officers of the city a claim of a preference right to purchase the lands from the state, since such act is inconsistent with the claim of adverse right.

SAME—SEVEN-YEAR STATUTE INAPPLICABLE WITHOUT COLOR OF TITLE, OR IN CASE OF PUBLIC USE. A claim to adverse possession of lands can not be made under Bal. Code, § 5503, where the claimant does not hold under color of title, nor where the lands were held for a public purpose, viz., a public street.

APPEAL—RECORD—COSTS—SHOWING ON MOTION TO RETAX. A motion to retax the costs allowed below will not be considered on

¹Reported in 75 Pac. 982.

appeal where the record does not disclose the showing that was made below, and all the costs might be taxed under certain circumstances.

Appeal from a judgment of the superior court for Jefferson county, Hatch, J., entered March 19, 1903, upon findings in favor of the plaintiff, after a trial on the merits before the court, a jury being waived, awarding plaintiff possession of a public street. Affirmed.

Sachs & Hale, for appellants.

A. W. Buddress, for respondent.

FULLERTON, C. J.—The respondent, the city of Port Townsend, brought this action to recover possession of, and quiet its title to, a portion of land claimed by it as a public street, of which the appellants were in possession. From the record it appears that the predecessors in interest of the appellants, during the years 1885, 1886, and 1887, constructed on tide lands in front of the city of Port Townsend a wharf, extending from the shore out towards deep water a distance of some three hundred feet. They were in possession, and in the actual use, of this wharf at the time the Territory of Washington was admitted into the Union as a state—the time the lands on which the wharf was constructed became state property. After the admission of the territory as a state, the city of Port Townsend, pursuant to the authority of the state constitution and the laws passed thereunder, extended its streets across the tide lands lying in front of itself, one of which, known as Front street, crossed the end of the appellants' wharf, cutting off some one hundred and five feet thereof. The builders of the wharf continued in its possession, and, when the board of appraisers for tide and shore lands were appraising tide lands in front of the city of Port Townsend in 1895, they sought to have that board

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appraise the lands in the street covered by their wharf as state lands, so that they might purchase the same as tide lands upon which they had improvements, and on the refusal of the board to make such an appraisement, brought mandamus against them to compel them so to do. The trial court refused to grant the writ, and an appeal was duly taken to this court, where the judgment of the trial court was affirmed. In that case, which was against the predecessors in interest of the present appellants, the validity of the dedication, and the proceedings taken to establish the street called Front street, as well as the rights of the possessors of the property to purchase it from the state, were in issue, and were determined against the rights of the applicants for the writ. The applicants continued in possession, however, and they, with the successors in interest, the appellants, have been in possession ever since; in fact, there has been a continuous possession of the wharf by the appellants and their predecessors in interest ever since the same was constructed in 1887.

In its complaint the city set out the proceedings had to establish the street, the decision of the trial court and of this court in the mandamus proceedings before mentioned, and averred that the appellants were in possession of a portion of the street claiming an interest therein, but without right. It prayed that its title and right to the street be established and quieted, that the appellants be ejected therefrom, and for general relief. The appellants moved to strike from the complaint certain parts thereof, and to make certain other parts more definite and certain. The motion to strike was sustained as to all that part of the complaint relating to the mandamus proceedings and the judgment of the court thereon, and overruled as to the remainder. The appellants thereupon filed a general demurrer to the complaint, which was also overruled, where-

upon they answered, putting in issue its material allegations, and pleading affirmatively the statute of limitations, and certain facts thought to estop the city from asserting its rights to the street in question, if any it ever had. A reply was filed, denying generally the allegations of the answer, and again setting out the mandamus proceedings, with the judgments entered therein. A jury was waived, and a trial had before the court, resulting in findings and a judgment for the city.

The appellants assign, among other things, that the court erred in overruling, in part, their motion to strike from the complaint, and to make certain allegations thereof more definite and certain; that it admitted evidence over their objections, and that it refused to grant a motion for nonsuit, made at the conclusion of the respondent's evidence. These assignments, however, suggest questions which are of no moment at this stage of the proceedings, no matter how pertinent they may have been at the time they were presented to the lower court. A motion to strike, or to make more definite and certain, is waived by pleading over and going to trial on the merits. Had the appellants stood on their motion, and appealed from the judgment the trial court might have thereafter entered against them, this court would listen to their objections, but they cannot have the benefit of the technical objection and the benefit of a hearing on the merits at the same time. They must waive either one or the other, and, when they proceed to the merits, it is a waiver of the technical objection.

The claim that the trial court erred in the admission of evidence is equally without avail. The case is one which this court tries *de novo*, in so far as the findings have been excepted to, and, this being so, it will disregard any evidence which it finds inadmissible. It is also immaterial whether or not the trial court erroneously refused to grant

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a nonsuit. By going on with the trial, and introducing evidence on their behalf, the appellants waived any technical advantage they might have availed themselves of by such a motion. Of course, if the evidence of the respondent did not at that time warrant a recovery, and the defect in the evidence was not subsequently supplied, the appellants can now successfully urge that the evidence before the court is insufficient to justify the findings and judgment, but the court must look to the whole of the evidence to ascertain that fact, not alone to the evidence of the respondent.

It is next urged that the complaint fails to state facts sufficient to constitute a cause of action. It is said there is no allegation in the complaint to the effect that the respondent is the owner, or entitled to the possession, of the street in question. Facts are alleged, however, which show it to be a public street of the city of Port Townsend, and, if a city of the third class may maintain an action of ejectment to recover a portion of one of its public streets, the complaint states a cause of action. On this question we have no doubt that such a right is vested in the city. By the statute it is given the right "to sue and be sued," and "to establish, lay out, alter, keep open, open, widen, vacate, improve and repair streets," etc., which is undoubtedly a grant of power sufficient to enable it in some manner to protect its streets against the encroachment of individuals. While the cases are not uniform on the question, we think the better rule is that the city may maintain a civil action for that purpose. *Southern Pacific Co. v. Hyatt*, 132 Cal. 240, 64 Pac. 272, 54 L. R. A. 522; *People v. Holladay*, 93 Cal. 241, 29 Pac. 54, 27 Am. St. 186; *Metropolitan City R. Co. v. Chicago*, 96 Ill. 628.

The next contention is that the court erred in sustaining an objection to certain questions asked the respondent's witnesses on cross-examination. These questions, it seems

to us, called for matter pertaining to the appellants' affirmative defense, and were properly refused as not cross-examination. But were it otherwise, we hardly think the appellants could be heard to complain of it successfully. The fact thus sought to be established was subsequently testified to by the appellants' witnesses, and, as there was no contradictory evidence, it may be taken as established.

The principal contention of the appellants is, however, that the action is barred by the statute of limitations, and to the argument of this question the principal part of the briefs is devoted. We have not, however, found it necessary to follow counsel on the main branch of this question; for, if it be conceded that title to a portion of a public street can be acquired by adverse possession during the period of the statute of limitations, it seems to us that the appellants' proofs fall short of showing such a possession as the rule requires. Undoubtedly they have shown actual and exclusive possession of the property in dispute, by themselves and their predecessors in interest, for more than ten years prior to the commencement of this action, but we think they have failed to show that such possession was adverse for that length of time. The record shows that, as late as 1895, they were contesting with the officers of the state and municipality their claim of a preference right to purchase these very lands. These acts on their part were wholly inconsistent with the idea of an adverse possession. To constitute an adverse possession there must be not only an ouster of the real owner, followed by an actual, notorious, and continuous possession on the part of the claimant, during the statutory period, but there must have existed an intention on his part, for a like period, to claim in hostility to the title of the real owner. *Blake v. Shriver*, 27 Wash. 597, 68 Pac. 330. Possession is not adverse,

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"if it be held under or subservient to a higher title." *Bellingham Bay Land Co. v. Dibble*, 4 Wash. 764, 31 Pac. 30. Tested by these rules, there was no adverse possession prior to 1895, and, if it be conceded that possession, subsequent to that time, was of a character to put the statute in motion, it has not continued for the required period.

The appellants also claim by virtue of § 5503, Bal. Code, but plainly this section is inapplicable for at least two reasons. In the first place, title is conferred thereby only when the claimant holds under color of title for the prescribed period, and the appellants in this instance have no color of title; and in the second, it is provided specially that it does not extend to lands or tenements held for any public purpose, and these lands are held for a public purpose, namely, a public highway.

The appellants have brought up in the transcript a certified copy of the cost bill filed in the court below, their motion to retax the costs, and the journal entry of the court denying the motion, and urge us to review the matter. What showing was made at the hearing of the motion does not appear, and the record is insufficient, for that reason, to enable us to determine whether or not there was any error in the ruling of the court. If the cost bill contained items which under no circumstances could be taxed as costs, this court would, on the showing made, strike them out. But the items objected to are not of that character. They could all be taxed under certain circumstances, and this court is bound to presume, in the absence of a record showing the actual circumstances, that sufficient was made to appear to justify their taxation by the court below.

The appellants also make the contention that the evidence was insufficient to justify the findings of fact, but we think

the record fully supports the trial court. There being, therefore, no substantial error, the judgment must be affirmed, and it is so ordered.

DUNBAR, HADLEY, ANDERS, and MOUNT, JJ., concur.

[No. 4778. Decided March 23, 1904.]

A. W. CRISWELL, *Appellant*, v. BOARD OF DIRECTORS OF
EVERETT SCHOOL DISTRICT NO. 24 *et al.*, *Respond-*
*ents and Appellants.*¹

SCHOOLS AND SCHOOL DISTRICTS—CONSTRUCTION OF BUILDING—CONTRACTS—ADVERTISING FOR BIDS—CHANGES IN CONTRACT WITHOUT READVERTISEMENT—DISCRETION OF BOARD. After a school board has duly advertised for bids for the erection of a school house, under Bal. Code, § 2366, it may make alterations in the specifications reducing the cost of the building, making proper deductions on account of work eliminated and additions for extras, and thereupon enter into a contract with the lowest bidder, without readvertisement, so long as the general plan of the building remains substantially the same, and the parties act in good faith; and such contract is not *ultra vires*, since said statute does not require more than to invite competitive bidding, and the terms and conditions of the contract are left entirely to the discretion of the board.

SAME. When the lowest bid for the construction of a \$32,900 school house was decided by the district to be too expensive, and changes were made to conform the basement to a new site, the name of the building changed, and the size slightly reduced, and ornamental features eliminated, reducing the cost \$6,230, as estimated by the architects, a contract with the lowest bidder for the erection of the building for \$26,670 upon the new site without readvertising for bids is not *ultra vires*, as there is no substantial deviation from the original plans.

SAME—FRAUD OF BUILDER AND ARCHITECTS—EVIDENCE OF—SUFFICIENCY. A finding of the trial court that a contractor and architect were guilty of fraud in suggesting changes in the specifications for a school building is not warranted where the specifications in the main were identical, and a committee of the board

¹Reported in 75 Pac. 984.

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Citations of Counsel.

were unable to find any material changes, except such as were agreed to and deduction made therefor.

SAME—FRAUD OF CONTRACTOR IN SECURING CONTRACT—ACCEPTANCE BY SCHOOL BOARD AFTER UNAUTHORIZED DEVIATIONS—RECOVERY ON QUANTUM MERUIT. Where the school district accepts a school building and uses it, after the contractor made many unauthorized deviations and omissions in the work called for by the contract, the district would be liable on a *quantum meruit* for the reasonable value of the building, and the fact that the contractor was guilty of fraud in securing the contract would be immaterial.

APPEAL—REVIEW—FINDINGS ON CONFLICTING EVIDENCE. Findings as to the reasonable value of a school building will not be disturbed on conflicting evidence.

PARTIES—ACTION BY TAXPAYER TO RESTRAIN PAYMENT OF WARRANTS—HOLDERS OF WARRANTS NOT JOINED—WAIVER BY FAILING TO RAISE POINT BY ANSWER OR DEMURRER. In an action brought by a taxpayer against the officers of a school district and a contractor to restrain the payment of the warrants issued in payment of the contract price of a school building, in which the complaint alleges and the answer admits that the warrants were issued to the contractor, a defect of parties by reason of the fact that the contractor had sold the warrants before the action was commenced is waived by failing to raise the point by demurrer or answer, under Bal. Code §§ 4907, 4909.

COSTS—ATTORNEY'S FEES—LIMITED BY STATUTE TO TEN DOLLARS. In an action by a resident taxpayer to restrain the payment of warrants, it is error to allow an attorney's fee of \$500 upon giving judgment for the plaintiff, Bal. Code, § 5172, providing for but \$10 therefor to be taxed as costs.

Cross appeals from a judgment of the superior court for Snohomish county, Denney, J., entered November 19, 1902, upon the findings and decision of the court, after a trial on the merits before the court without a jury, in an action to restrain the payment of school warrants. Affirmed, except as to the allowance for attorney's fees.

McMurchie & Bundy, for appellant, contended, *inter alia*, that the contract is not the result of competition, as contemplated by the statute, in case substantial changes are permitted. *Dickinson v. Poughkeepsie*, 75 N. Y. 65;

Nash v. St. Paul, 11 Minn. 174; *Reichard v. Warren County*, 31 Iowa, 381; *McBrian v. Grand Rapids*, 56 Mich. 95, 22 N. W. 206; *People v. Board*, 43 N. Y. 227; *Texas Transp. Co. v. Boyd*, 67 Tex. 153, 2 S. W. 364; *McGreevey v. Board of Education*, 20 Ohio Cir. Ct. 114; *Bonesteel v. New York*, 22 N. Y. 162. The occupation of the building does not create any liability on the part of the district. *McCloud v. Columbus*, 54 Ohio St. 439, 44 N. E. 95; *McDonald v. Mayor*, 63 N. Y. 23, 96 Am. St. 635; *Addis v. Pittsburg*, 85 Pa. St. 379; *Goose River Bank v. Willow Lake School Tp.*, 1 N. D. 26, 44 N. W. 1002, 26 Am. St. 605; *Reichard v. Warren County*, *supra*; *Turney v. Bridgeport*, 55 Conn. 412, 12 Atl. 520; *Parr v. Greenbush*, 72 N. Y. 463; *McBrian v. Grand Rapids*, *supra*; *Newbery v. Fox*, 37 Minn. 141, 33 N. W. 333, 5 Am. St. 830; *Trustees v. Hohn*, 82 Ky. 1; *Burrill v. Boston*, Fed. Cas. No. 2198; *Wickwire v. City of Elkhart*, 144 Ind. 805, 43 N. E. 216; *Miller v. Sullivan*, 32 Wash. 115, 72 Pac. 1022.

Cooley & Horan, for respondent and appellant T. L. Grant. Since the statute does not require the contract to be let to the lowest bidder, its terms and conditions are to be left to the discretion of the board. *Yarnold v. Lawrence*, 15 Kan. 126; *Elliott v. Minneapolis*, 59 Minn. 111, 60 N. W. 1081; *Mayo v. County Com'rs*, 141 Mass. 74, 6 N. E. 757; *Oakley v. Atlantic City*, 63 N. J. L. 127, 44 Atl. 651; *Schefbauer v. Kearney*, 57 N. J. L. 588, 31 Atl. 454; *Shaw v. Trenton*, 49 N. J. L. 339, 12 Atl. 902; *McGovern v. Board etc.*, 57 N. J. L. 580, 31 Atl. 613. The two buildings being substantially the same, it was within the power of the board to make the changes. *Commissioners of Gibson County v. Cincinnati Steam etc. Co.*, 12 L. R. A. 502; *Kitchel v. Board of Com'rs*, 123 Ind.

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Citations of Counsel.

540, 24 N. E. 366. There was a fatal defect of parties, and the court could make no decree until the warrant holders were brought in. *Savage v. Sternberg*, 19 Wash. 679, 54 Pac. 611, 67 Am. St. 751; *Mayor v. Lord*, 9 Wall. 409; *Stallcup v. Tacoma*, 13 Wash. 141, 42 Pac. 541, 52 Am. St. 25; *Mallow v. Hinde*, 12 Wheat. 193; *Shields v. Barrow*, 17 How. 129; *California v. Southern Pac. R. Co.*, 157 U. S. 229, 15 Sup. Ct. 591; *State ex rel. McCain v. Metschan*, 32 Ore. 372, 46 Pac. 791, 53 Pac. 1071, 41 L. R. A. 693; *Graham v. Minneapolis*, 40 Minn. 436, 42 N. W. 291; *Buie v. Cunningham* (Tex.), 29 S. W. 801; *City of Anthony v. State*, 49 Kan. 246, 30 Pac. 488.

Brownell & Coleman, for respondent and appellant school board, to the point that the acceptance of the building rendered the district liable for its reasonable cost, the contract being executed, cited: *San Francisco Gas. Co. v. San Francisco*, 9 Cal. 472; *Central Transp. Co. v. Pullman*, 139 U. S. 24, 11 Sup. Ct. 478; *Hitchcock v. Galveston*, 96 U. S. 341; *Chapman v. Douglas County*, 107 U. S. 348, 2 Sup. Ct. 62; *Bicknell v. Widner School District*, 73 Ind. 501; *Auerbach v. Salt Lake County*, 23 Utah 103, 63 Pac. 907; *Argenti v. San Francisco*, 16 Cal. 256; *Sacramento County v. Southern Pac. R. Co.*, 127 Cal. 217, 59 Pac. 568; *Tacoma v. Lillis*, 4 Wash. 797, 31 Pac. 321, 18 L. R. A. 372; *Brown v. Atchison*, 39 Kan. 37, 17 Pac. 465, 7 Am. St. 515; *Moore v. Mayor*, 73 N. Y. 240, 29 Am. Rep. 134; *Brady v. Mayor*, 20 N. Y. 312; *County Com'rs v. Hunt*, 5 Ohio St. 488; *Bass F. & M. Works v. Parke County*, 115 Ind. 234, 17 N. E. 593; *Clark v. Dayton*, 6 Neb. 192; *National Tube Works v. Chamberlain*, 5 Dak. 54, 37 N. W. 761; *Allegheny City v. McClurkan*, 14 Pa. St. 81; *Memphis Gaslight Co. v. Memphis*, 93 Tenn. 612, 30 S. W. 25; *Grand Island Gas Co. v.*

West, 28 Neb. 852, 45 N. W. 242; *Farmer v. St. Paul*, 65 Minn. 176, 67 N. W. 990; *Ford v. Cartersville*, 84 Ga. 213, 10 S. E. 732; *Smith v. Board of Com'rs* (Ind.), 33 N. E. 243; *Brown v. Merrick Co.*, 18 Neb. 355, 25 N. W. 356; *Tash v. Adams*, 10 Cush. 252; *Fuller v. Inhabitants of Melrose*, 1 Allen 166; *Kagy v. Independent District*, 117 Iowa 694, 89 N. W. 972.

MOUNT, J.—This action was brought in the lower court by the plaintiff, a resident and taxpayer, to restrain the payment of certain school warrants, issued by the officers of school district No. 24, in Snohomish county, in payment of the contract price of a school building for said district, constructed by defendant Grant. Upon a trial the court entered a decree, restraining payment of a part of the warrants and refusing to restrain payment of the balance, and also ordered the school district to pay \$500 as an attorney's fee to plaintiff's attorneys. The plaintiff appeals from that part of the decree refusing to restrain the payment of all the warrants. Defendant Grant appeals from that part of the decree restraining the payment of warrants. The school district appeals from that part awarding an attorney's fee in favor of the plaintiff.

The amended complaint contains four causes of action, one of which was abandoned by stipulation. The gist of the other three is, (1) failure of the contractor to construct the building in accordance with the plans and specifications; (2) that the contract was void because of failure of the school board to advertise for bids for the erection of the building; and (3) fraud and collusion in making the contract. The answer of the defendant Grant, after denying the material allegations of the complaint, alleges substantial compliance with the contract, but admits certain minor departures and omissions from the plans and speci-

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cations, and denies any fraud or collusion. For affirmative defenses he alleges, the facts in relation to the advertisement for bids; that his bid was the lowest; that, after certain changes in the plans and specifications to conform the building to a new site, the contract was let to him, and was substantially performed before the action was brought. For a second affirmative defense he alleges laches on the part of the plaintiff. The answer of the school board denies generally the material allegations of the complaint, but admits certain departures from the original plans, and also pleads laches on the part of the plaintiff. The plaintiff for reply denies the new matter set up in the answers.

Upon the facts, as they appear in the record, there is substantially no dispute, except as to the reasonable value of the building which was erected. They are briefly as follows: In February, 1902, the school district was reorganized under the law providing for a district in cities containing over 10,000 inhabitants. At that time the school buildings in the district were inadequate to accommodate the school children, and there was great necessity for another school building. The city board of education determined to erect an eight-room school building on the site of the Jefferson school grounds, to be known as the "Jefferson Annex." Architects were thereupon employed to prepare plans and specifications for such building. A building was designed, consisting of a two-story wooden structure, resting on a basement of masonry. On account of the site being a hillside, the basement walls were not of the same dimensions on all sides. The superstructure contained a number of ornamental wooden columns at the entrances. The specifications provided for a complete eight-room building, provided with ventilating and heating apparatus and a basement.

Upon these plans and specifications, bids were advertised for. In response to the advertisement, ten bids were filed by different parties. The bid of defendant Grant for \$32,900 was the lowest. Upon receipt of these bids, the board was of the opinion that the building was more expensive than the district wanted to build, and a meeting of the electors of the district was called to consider the question of the cost of the building. The result of this meeting was an authorization to the board to purchase another site for the proposed building, after eliminating the ornamental columns and a portion of the foundation.

The board accordingly purchased another site on a level place, and directed the architects to amend the specifications so as to eliminate the ornamental columns and make the basement conform to the new site. These changes, and others necessitated by the location, were made in the plans and specifications. The size of the building was also slightly reduced without the knowledge of the board. The architects thereupon gave the board an estimate of \$6,230 as the amount which should be deducted on account of these changes. Thereafter, on March 29, 1902, the board adopted a resolution authorizing the erection of the building on the new site, "in accordance with the changes and alterations, as suggested by the board and architects, of the original plans;" and the name of the new building was changed from "Jefferson Annex" to "Jackson School."

No further advertisement for bids was published, but the board deducted \$6,230, as estimated by the architect to be the difference in cost between the original and the modified plans and specifications, from the bid of Mr. Grant, and authorized a contract with him for the erection of the building for \$26,670. This contract was entered into on April 1, 1902. It is the usual builder's contract, providing for deductions and extras and for the payment

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of seventy-five per cent of the value of the work and materials, as the work progressed. Bonds were given by the contractor, as required by law, for the faithful performance of the contract.

Work was begun on the building on May 1, 1902. During the progress of the work, the district decided to make a change in the heating plant, and it was accordingly made, and a more expensive heating plant was installed, and an allowance of \$1,500 was made to the contractor on account thereof. Extra work on the foundation was ordered and also allowed, to the amount of \$892.50. Numerous other minor changes were made by the contractor for his benefit, without the knowledge or authority of the board, which changes are estimated to amount to about \$1,200. In September, 1902, when this action was begun, the building was substantially completed, and was shortly thereafter put to use by the district, and was occupied as a school building during the trial of the case. Warrants amounting to \$27,092.50 had been issued by the board, and delivered to the contractor, and disposed of by him before the action was begun. The holders of these warrants were not made parties to the action. Defendant Grant held none of the warrants. The building erected is a good, substantial, modern school building, well adapted to the purposes intended, and well supplied with sanitary, lighting, and heating facilities, but lighter in structure, somewhat smaller in size, and cheaper in many details of construction, than the building first advertised for.

In addition to the facts above stated, the trial court found that the defendant Grant and the architects, who were the agents of the board, collusively and fraudulently changed the plans and specifications, and substituted in-

ferior materials in the course of the construction of the building, in order to obtain an excessive and dishonest profit; that the reasonable value of the building, as completed, is \$20,535.56. The court upon its findings entered a decree restraining the district from issuing any further warrants, and restraining the payment of all issued in excess of the reasonable value of the building, as stated, ordered the school district to pay to plaintiff's attorneys \$500, and entered judgment against defendant Grant for the costs of the action.

It is first argued by appellant Criswell that the contract which was entered into by defendant and the school board was *ultra vires* and void, because it was let without advertising for bids. Many cases are cited to the effect that, where a municipal corporation is required by its charter to let contracts in a certain specified way, it is beyond the power of such a corporation to let contracts in any other way; that obligations entered into in violation of law are void, and no rights or liabilities are incurred thereunder. The cases cited are all based upon statutes which require the officers of the corporation to advertise for bids, and to let the contract to the lowest bidder, and there was no discretion left to the officers, except perhaps to determine the lowest bid. Among many cases cited are: *Arnott v. Spokane*, 6 Wash. 442, 33 Pac. 1063; *Moran v. Thompson*, 20 Wash. 525, 56 Pac. 29; *State v. Pullman*, 23 Wash. 583, 63 Pac. 265; 83 Am. St. 836. There can be no doubt that the principles announced in these cases are the settled law, not only of this state, but of all the states where similar questions have arisen. If this case falls within the principles of those cases, the rules therein announced must govern.

The power of the board of education to build a school

building, we understand, is not questioned, or, if so, the record is clear that they had such power. The question is, did the board have the right to enter into the contract. The statute governing such transactions is as follows:

"In all districts contemplated by this chapter, when, in the opinion of the board, the cost of any lot of furniture, stationery, apparatus, fuel, building or improvements, or repairs to the same, will equal or exceed the sum of \$200, it shall be the duty of the board to give due notice by publication in at least one daily newspaper published within said city, and if there be no daily, then in one or more weekly papers in three regular consecutive issues, of the intention to receive bids for such lots of furniture, stationery, fuel and other supplies, or for said improvements and repairs. The board shall determine the specifications for such bids, which shall be public." Section 2366, Bal. Code.

While this statute does not require the contract for such supplies, buildings, or repairs to be let to the lowest bidder, yet it is the evident purpose to require a notice and an opportunity for competitive bidding, so that the contract may be let to the best advantage of the municipality. The power of the board to contract is limited, by the section quoted, only to the extent of requiring notice of *intention to receive bids* upon specifications which are open to bidders. No other restrictions are made. The terms and conditions of the contract are left entirely to the discretion of the board. *Mayo v. County Com'rs*, 141 Mass. 74, 6 N. E. 757.

It was not the purpose of this section to tie the hands of school boards, so that every detail in plans and specifications for school buildings shall be irrevocably fixed, and no contract made or building constructed except exactly as specified. The evident purpose was to benefit the school district by inviting competitive bidding upon con-

tracts for proposed buildings and supplies, etc. The plans and specifications are for the purpose of showing the substance of what is desired. In this case the board was authorized to construct a school building. Plans and specifications were prepared. They were public. A notice as required was published, and bids were received. Defendant Grant's bid for \$32,900 was the lowest. There can be no doubt that the board, under all the authorities cited by appellant Criswell, was authorized to enter into a binding contract with defendant Grant, at the price bid for the construction of the building, as planned at the time advertisements were published. Nor can there be any doubt that, by such contract, the board might have reserved a right, as it in fact did, to make alterations in the specifications agreeably to both during the progress of the work, so long as the general plan of the building was not changed. *Board of Com'rs v. Cincinnati Steam Heating Co.*, 128 Ind. 240, 27 N. E. 612 12 L. R. A. 503; *Bass Foundry etc., Works v. Parke County Com'rs*, 115 Ind. 234, 17 N. E. 593; *Kitchel v. Board of Com'rs*, 123 Ind. 540, 24 N. E. 366. If this may be done after the contract is entered into, it may be done at the time, as a part of the contract.

It is no doubt true that one bidder may not change his bid, after knowledge of other bids, so as to make it lower than another. This would be a fraud upon other bidders. And the board of education may not call for bids upon a given plan, and, after bids have been made thereon, so change the plan as to make an entirely different building, and require bidders to accept a contract upon the plan as changed. Nor may the board enter into private negotiations with one of the bidders upon a different plan; this would avoid the statute. But where the plan remains substantially the same, and the parties act in good faith,

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detail features, which are not necessary to the building, and which do not change the substantial character of it, may be eliminated on terms agreeable to the board and the bidder entitled to the contract upon the plans as advertised. Where a proper deduction from his bid is made on account thereof, such a change in the specifications would not be *ultra vires* of the board. This, we think, is all that was done in this case. There is no evidence of any bad faith on the part of the board or the defendant Grant in this respect, and we are therefore of the opinion that the contract entered into was within the powers of the board, and was a valid and binding contract upon the district.

The next two points presented by appellant Criswell are to the effect that, the contract being *ultra vires* and void, the contractor Grant cannot recover upon the contract, or upon the *quantum meruit*, and the fact that the district occupies the building, and has accepted the benefits, creates no liability. This is no doubt correct where the contract is *ultra vires*. But since we have already concluded that the contract was not beyond the power of the board, it will not be necessary to notice these points.

It is next contended that the contract was void for fraud. It is not claimed, however, that the school board was guilty of any fraud, or that the members thereof were actuated by other than the best of faith, and solely with a view to the best interests of the district. But it is claimed that defendant Grant and the architects fraudulently changed the plans and specifications, so as to make a dishonest profit. We have carefully examined the whole record in the case, and particularly that bearing upon this question, and are satisfied that there is no sufficient evidence upon which to base a conclusion of fraud, on the part of either the architects or the contractor, prior to

the time the contract was entered into. Before the contract was let, specifications, upon which the advertisement was made and the ones upon which the building was constructed, were compared by the architect and a committee of the board of education, and the board were unable to find any material differences therein, except a change in the foundation and in the ornamental columns. There were, however, minor changes, some of which were noticed and discussed, while others were not discussed or not noticed. But, in the main, the specifications were identical. The slight change in the size of the building, which did not interfere with its efficiency, was not called to the attention of the board, and they apparently did not notice it until after the trial was in progress. The architect explains this by saying that it was made to reduce the cost of the building, and a proper deduction was made for it; that he supposed the board had knowledge thereof.

However, this point becomes immaterial, because the court concluded, on account of such fraud, that the district was liable only for the reasonable value of the building, which was found to be \$20,535.56. In this conclusion we think the court was right, not because of the fraud, but because the contractor, after the contract was entered into, made many material changes and omissions in the work without authority of the board, and against the protests of the architect; and on this account, if Grant were suing, he could not recover upon the contract. But where the contract is not unlawful, and the district has accepted and is using the building, which is in all respects suitable for its purposes, common honesty requires that it should pay the reasonable value thereof. 6 Cyc., 111, and cases cited; *Kagy v. Independent Dist.*, 117 Iowa 694, 89 N. W. 972; *Chapman v. Douglas County* 107 U. S. 348, 2 Sup. Ct. 62, 27 L. Ed. 378. Appellant

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contends that the amount allowed is in excess of the reasonable value. There is much conflict in the evidence upon this point, and for that reason we shall not disturb the finding of the trial court.

Appellant Grant maintains that there is shown to be a defect of parties, and that the cause must therefore be reversed. This contention is based upon the fact that all the warrants issued by the district, and delivered to Grant, were disposed of, and are held by purchasers who were not made parties to the action, and who are not now before the court. The statute, at § 4907, Bal. Code, provides that, where it appears upon the face of the complaint that there is a defect of parties, objection may be taken by demurrer. Section 4909 provides that, where this fact does not appear upon the face of the complaint, the objection may be taken by answer. Section 4911 provides that, if no objection be taken either by demurrer or answer, the defendant shall be deemed to have waived the same. The complaint alleged that the warrants had been issued to defendant Grant. When defendant Grant answered, he admitted this fact, but did not allege that other persons, not parties to the action, were the owners thereof, although the fact was within his knowledge. At the trial, and over the objection of the plaintiff, Grant was permitted to state that he was not the owner of any of the warrants, but had disposed of all of them before the action was begun. Under the statute it is clear that Grant had waived this point, and it was too late for him then to raise the question. *State ex rel. McCain v. Metschan*, 32 Or. 372, 46 Pac. 791, 53 Pac. 1071, 41 L. R. A. 692. It is true that in *Stallcup v. Tacoma*, 13 Wash. 141, 42 Pac. 541, 52 Am. St. 25, this court held, in a case where the action was brought to restrain the payment of interest on certain bonds, that absent bond-

holders were necessary parties, and that the court could make no decree affecting their rights, and this decision is no doubt in accord with the rule of law upon the question; but in that case the question was properly and seasonably raised. See, also, *Savage v. Sternberg*, 19 Wash. 679, 54 Pac. 611, 67 Am. St. 751.

By the appeal of the school district, the authority of the court to allow an attorney's fee of \$500 in this case is questioned. There is no statute in this state allowing attorney's fees in a case of this kind, except § 5172, Bal. Code, which provides for \$10 to be taxed as costs. In the absence of a statute, an allowance except for costs as provided is beyond the power of the court. *Larson v. Winder*, 14 Wash. 647, 45 Pac. 315; *Trumble v. Trumble*, 26 Wash. 133, 66 Pac. 124; *Ditmar v. Ditmar*, 27 Wash. 13, 67 Pac. 353, 91 Am. St. 817; *Legg v. Legg*, ante p. 132, 75 Pac. 130. That part of the judgment allowing an attorney's fee is therefore reversed. In all other respects the judgment is affirmed. The board of directors will recover costs against appellant Criswell. Appellant Grant will recover no costs.

FULLERTON, C. J., and DUNBAR, HADLEY, and ANDERS, JJ., concur.

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[No. 4960. Decided March 23, 1904.]

ROYAL A. GOVE, *Respondent*, v. CITY OF TACOMA,
Appellant.¹

MUNICIPAL CORPORATIONS—ORDINANCES—PASSAGE—PRIMA FACIE PROOF—CERTIFIED COPY OF RECORD. Under Bal. Code, § 1299, a certified copy of the record of an ordinance is prima facie proof of its due passage, establishing the existence of the ordinance until the presumption is overcome.

¹Reported in 76 Pac. 73.

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Syllabus.

SAME—RECORD BOOK—ORIGINAL SIGNATURES OF OFFICERS. Where a city charter requires a record book of ordinances to be signed by certain officers, the same with the original signatures of such officers is valuable and weighty evidence in support of the statutory *prima facie* proof by a certified copy of the record and is not overcome by evidence of a mere negative character.

SAME—JOURNAL ENTRIES—IDENTIFICATION OF ORDINANCE BY REFERENCE TO SUBJECT MATTER. The journal entries need not refer to an ordinance by number, and they sufficiently identify the ordinance by reference to its subject matter, when no other ordinances were introduced upon the same subject.

SAME—JOURNAL ENTRY AS TO PASSAGE. A journal entry to the effect that an ordinance "was passed by council" is not insufficient as a legal conclusion, but is in reality a statement of a fact when there is other evidence of its due passage.

SAME—ORAL EVIDENCE OF VOTE WHERE JOURNAL IS SILENT. When the journal entry states that an ordinance "was passed by council" without stating what the vote was, it is competent to show by the oral testimony of a member of the council who was present that the ordinance was passed by a vote of twelve for and four against it, upon the theory that evidence *abundante* the record is admissible where no record was made.

TAXATION—SALE FOR CITY TAXES—VALIDITY—FEE FOR CERTIFICATE—NOT PART OF COSTS. Upon a sale of lands for city taxes the addition of \$1.00 for issuing the certificate of sale constitutes such a part of the sum for which the land was sold as to render the certificate void, when the costs allowed by law included only "costs to date of sale," and "costs as advertised," and the notice to the owner did not warn him of any such additional burden (FULLERTON, C. J., dissents).

SAME—FEE FOR CERTIFICATE IN EXCESS OF TAX—ORDINANCE GUARANTEEING REPAYMENT IN CASE OF VOID SALE—OBLIGATION OF PURCHASER TO INVESTIGATE. Where an ordinance guarantees to purchasers at city tax sales the repayment of the original amount with interest from date of sale, in case the sale shall be declared void, the purchaser is under no obligation to make an investigation as to the amount demanded by the city, and the sale is void by reason of the city's having unlawfully demanded a fee of \$1.00 in excess of the tax and costs due, and the city cannot claim that such fee is no part of the sum paid at the sale.

SAME—TAX SALE—VALIDITY—EXCESS IN SMALL AMOUNT. A void tax sale for too large an amount can not be held valid on the ground that the amount of the excess was small.

SAME—IRREGULARITIES AVOIDING TAX SALE—EXCESS IN AMOUNT. A summary sale of land for taxes must strictly follow the direction of the law, and is void where there is an excess of one dollar charged, taken in connection with such other irregularities as failure to comply with the requirements to accompany the roll with an affidavit as to its correctness, to carry out in separate columns the amount issued against each owner, to sell in the alphabetical order of the names of the owners, and to offer to sell to the person who would take the least quantity and pay all taxes against the owner (Fulleerton, C. J., dissents).

LIMITATION OF ACTIONS—TAX SALE FOR EXCESSIVE AMOUNT—GUARANTEE OF CITY—ACTION TO RECOVER SUM PAID—STATUTE BEGINS TO RUN WHEN—DISCOVERY OF INVALIDITY OF SALE—KNOWLEDGE OF PURCHASER. Where an ordinance guarantees to purchasers at city tax sales the amount paid in case the sale shall be declared void, and provides for notice thereof to be given the purchaser, the statute of limitations against an action based on the ordinance does not begin to run until the purchaser discovers that the sale was void, and the bare fact that an excessive fee of \$1.00 was unlawful, does not charge the purchaser with knowledge that the sale was void, since the city by the ordinance undertook for itself to make the discovery and notify the purchaser.

APPEAL—DECISION—IMPORTANCE OF CASE. The fact of the great importance of the case by reason of the large amount involved in similar pending cases does not justify departure from established principles.

Appeal from a judgment of the superior court for Pierce county, Snell, J., entered July 31, 1903, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to recover the amount paid upon void tax sales. Affirmed.

William P. Reynolds, Emmett N. Parker, and Harvey L. Johnson, for appellant.

B. F. Heuston, for respondent.

HADLEY, J.—This cause was once before in this court, as will be seen in *Gove v. Tacoma*, 26 Wash. 474, 67 Pac. 261. Prior to the other appeal, the trial court sustained a demurrer to the complaint, and entered judgment

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of dismissal. This court reversed the judgment, and remanded the cause with instructions to overrule the demurrer. Upon the return of the cause to the superior court, the demurrer was overruled. Issues were joined by answer and reply, a trial was had before the court without a jury, and a judgment entered that the plaintiff shall recover according to the demand of his complaint. The city has appealed.

Reference to the former opinion will disclose that the action is based upon the provisions of an alleged ordinance of the city of Tacoma, whereby the city undertook to reimburse purchasers of certificates at city tax sales, if it should develop that the certificates were illegally or erroneously issued. The ordinance is fully set forth in the former opinion, and we hereby refer thereto for its terms. The first assignment of error here is that the trial court erred in finding that the city passed the said ordinance, and that it became a valid law. Appellant correctly states that, if there is no law in the form of statute or ordinance which renders the city liable to refund the purchase money for these tax sale certificates, then the rule of *caveat emptor* applies, and the respondent has no remedy. When the cause was here before, the demurrer to the complaint admitted the allegations as to the existence of the ordinance, and the discussion of the case at that time was upon the assumption that such an ordinance in fact existed. Under the subsequent pleadings, however, the existence of the ordinance was put in issue.

It is contended that the evidence is insufficient to sustain the finding that the ordinance was passed by the city. In the first place, it is provided by § 1299, Bal. Code, that all city ordinances shall be recorded in a book

to be kept for that purpose by the city clerk, and, when so recorded, the record thereof shall be received in any court of this state as prima facie evidence of the due passage of the ordinance as recorded. Such a record of this ordinance was introduced, and, since under the statute the record was prima facie evidence of due passage, it must be held that said evidence establishes the existence of the ordinance, unless the presumption attending the prima facie proof has been overcome by other proof. In addition to the above statutory provision, it was admitted at the trial that the charter of the city requires that all ordinances shall be recorded at length in a book to be kept for that purpose, and that, after such record is made up, each ordinance shall be there again signed by the mayor of the city and the president of the council, and shall also be attested by the clerk. Such a book was also introduced in evidence, and it was found to contain this ordinance, with the original signatures of the mayor, the president of the council, and city clerk, as required by charter. It was also admitted that the ordinance was regularly published in the official newspaper of the city, as required by the charter.

By statute the mere ordinance record book was prima facie evidence, but this record was further fortified by the actual signatures thereon of the sworn officers of the city, who had signed it in accordance with directions of the charter. Respondent's counsel observes in this connection that, when a record is thus fortified by the acts of sworn officers, it would seem that nothing short of proof of actual fraud amounting to a criminal conspiracy could overcome the presumption that the ordinance was really passed. We are not now prepared to say that such may be the law; but it is sufficient to say that the signatures

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of the officers, thus entered in a book kept under charter directions for that purpose, constitute valuable and weighty evidence, which it is proper to consider in addition to the ordinary presumption arising from the prima facie proof made by the record itself. Therefore, unless the presumption attending the prima facie proof, and said additional evidence of a highly credible character, have been overcome by other proof, the ordinance must be held to have been duly passed.

The evidence offered by appellant is of a negative character. It is urged that, as the journal of the city council proceedings fails to show certain facts, it should be found that such facts did not exist. The journal shows, that an ordinance on the subject of which this one treats was introduced and read the first time; that the rules were suspended and it passed to a second reading, after which it was referred to the judiciary committee; that said committee reported favorably upon the ordinance, and that the report was adopted; that the ordinance then passed to a third reading, was amended in a particular specified, and, as amended, was passed. It is insisted that the journal entries are not sufficient to identify this ordinance as the one referred to in the entries. We think they are. It is not referred to by any number, it is true; but it was shown that it is not the custom of the city to give numbers to ordinances until after they have actually passed and been properly signed. The proper number of this ordinance does appear in the margin opposite the last journal entry upon the subject; but it appears that this was placed there by the clerk at a time after the record was made. In any event, the subject-matter of the journal entries and of the ordinance was the same; and it satisfactorily appears that no other ordinances have been introduced upon this subject.

It is, however, further contended that the journal does not show that the required number of councilmen voted for the passage of the ordinance. The record states that it "was passed by council." It is argued that the above words state a legal conclusion only, and that the failure to state by what vote the ordinance was passed was fatal. Oral evidence was admitted to show the actual vote by which it was passed, and the appellant assigns the admission of such oral evidence as error. Appellant cites *Buckley v. Tacoma*, 9 Wash. 269, 37 Pac. 446, as supporting its contention that oral evidence was improperly admitted. In that case it was sought to establish that the prayer of a certain remonstrance was granted, for which a two-thirds vote of the council was required. The journal failed to show by what vote it was done. The city clerk testified that the vote was probably *viva voce*. The court said: "The record being thus bare of facts to sustain the proposition that the committee report was adopted by the vote of eleven or more members, the burden was upon the respondent to establish it, but it failed therein, as the testimony of the clerk showed still more conclusively that nobody knew what the real vote was." Thus an effort was made to prove the fact orally, but it appeared that no one knew what the fact was. The testimony of the clerk was unavailing, for if the vote was taken *viva voce*, then, as the court observed, "the *viva voce* vote which the clerk recorded may have been merely the ayes of half a dozen members; the remainder keeping silent."

The witness who testified in the case at bar was a member of the city council when this vote was taken. He testified that he knew that the ordinance passed the council, and that the vote was twelve for the ordinance and

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four against it, or that three voted against it and one was absent. Unlike the testimony in *Buckley v. Tacoma*, *supra*, the above was a positive statement of the fact as to the vote and how it was divided. If the testimony was competent, it sets at rest the contention that the ordinance may not have received the required number of votes. The authorities are not uniform as to this character of proof; but this court has held that oral evidence is admissible to show what has actually been done by boards of county commissioners when no record of the subject has been made, though the law provides that such a record shall be kept. The rule is based upon the theory that, as there is no statute which makes the records of county commissioners the only evidence of their proceedings, it is competent to introduce evidence *aliunde* the record to prove actual proceedings of which no record has been made. *Robertson v. King County*, 20 Wash. 259, 55 Pac. 52; *Long v. Pierce County*, 22 Wash. 330, 61 Pac. 142; *Nickeus v. Lewis County*, 23 Wash. 125, 62 Pac. 763; *Burrows v. Kinsley*, 27 Wash. 694, 68 Pac. 332.

We see no reason why the rule applied to the acts of boards of county commissioners, who are the acting functionaries of subordinate municipalities of the state, shall not apply with equal force to the acts of city councils, who represent municipalities of like character. We therefore think the court did not err in admitting and considering the evidence. The evidence of the witness effected little more than to make certain what was already reasonably certain from other proof, viz.: that the journal entries referred to the ordinance that was recorded and published, and that the statement in the journal—that the ordinance was passed—while technically the statement of a legal conclusion, was in reality the statement of a fact. For the

foregoing reasons, we do not think that the presumption in favor of the regular passage of this ordinance has been overcome; but we think it is abundantly supported, and it must be held that the ordinance is valid.

It is next assigned that the court erred in finding and holding that the one dollar fee indorsed upon the certificates of sale, and which was paid by the purchaser, constituted such a part of the sum for which the land was sold at tax sale as rendered the certificates void. Two propositions are urged by appellant in support of its contention in this connection: (1) that the fee was no part of the bid or purchase price of the land; and (2) that, even if it was a part of the purchase price, the charter authorizes the charge as a part of the costs. We are unable to find any charter provision which we think authorizes the charge as a part of the costs. The reference to costs in § 115 is, "Costs to date of sale." In § 117 it is, "Costs as advertised." We think the property holder, from the charter provisions and from the notice of sale, had the right to assume that all costs were included in the amounts set out in the notice. The notice stated that the sale would be made to satisfy the delinquent and unpaid taxes, with interest, penalty, and costs. A gross sum was then set out in front of each description of property, and the reasonable inference to be drawn from the notice was that the amount stated in each instance included costs, and was the whole sum that would be demanded at the sale. The charter provision relating to the issuance of the certificate of sale in no way refers to any charge for its issuance. We think the fee cannot be regarded as costs, within the charter provisions, and especially so, since the notice to the land owner did not warn him of the attempt to cast the additional burden upon his land.

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It is next contended that, even if the dollar fee was not properly collectible as costs, it constituted no part of the sum paid at the sale. It is therefore argued that the purchaser, by mandamus, could have compelled the issuance of the certificate without the payment of the one dollar fee. Granting that he might have done so, yet the ordinance above discussed was passed to serve the convenience of the city, and to induce this purchaser and others to pay money at once, without stopping to inquire as to the regularity of the proceedings, or as to what might be done through the courts. The purchase was made under a solemn guaranty of the city that the proceedings were regular, the certificates good, the amount paid a lien upon the land, and, if not so, that the whole sum would be repaid by the city. Under such circumstances the purchaser was under no obligation to make any investigation, but had a right to rely upon municipal good faith in the payment of the entire sum which was demanded as a condition for the delivery of his certificate. The guaranty of the ordinance is that the holder of the certificate "shall receive the original amount paid by him, together with ten per cent interest per annum from the date of sale." It is plain, from what has been said, that he could not demand the one dollar, and interest thereon, from the land owner in the event of redemption, and he is under no obligation to split his demands, making a part against the land owner and part against the city. His dealing was with the city, and, under the plain terms of the guaranty, he has the right to make a single demand from the city for the whole sum guaranteed. Moreover, as the land owner could insist that the certificate was void, the purchaser was not in position to enforce any portion of the sum represented by it as a lien against the land. While the amount of the unlawful charge was small, yet

the principle involved is the same as if it had been a larger sum. As the trial court, in an opinion filed, aptly observed, if the officer can, at his own caprice, charge one dollar against a given piece of property, the amount he may charge is limited only by his caprice.

In the opinion filed by the trial court, the only matter specifically mentioned as rendering the certificates void was the one dollar fee. But respondent urges that other facts, found by the court but not mentioned in the said opinion, were also sufficient to make them void. Among the facts so found which are urged as fatal irregularities are the following: The charter provides that the city clerk shall deliver the equalized assessment roll to the controller, and shall accompany it with his affidavit to the correctness thereof. A form of affidavit accompanying the roll of 1892 appears to have been signed by the clerk. Objection is made to it as insufficiently complying with charter requirements. Not discussing that subject, it does appear, however, that no jurat was signed by any officer, certifying that the clerk was ever sworn. The charter also requires that the controller shall carry out in separate columns on the roll the amount of the taxes assessed against each individual, firm, company, corporation, or unknown owner. The court found that this was not done, and that the controller knowingly pursued a different plan, viz.: that the property was set out in numerical order, so that the descriptions of different tracts owned by one person were separated and mixed with the descriptions of the property of others; and also that the owner of the property described in the certificates in question owned more than one tract included in the roll. The charter required that the notice of sale should conform to the plan provided for the assessment roll, and

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that at the sale the treasurer should offer for sale the property advertised, commencing at the head of the list and continuing, in alphabetical order, with the names of persons whose taxes were delinquent. The court found that this was not done, but that the treasurer sold each piece as listed upon the roll, and not in alphabetical order. The charter required that the treasurer should offer to sell all the property of any owner of two or more tracts of land to the person who would take the least quantity so offered, and pay all the taxes against such owner or against his property. The court found that this was not done, and that the lists were not so made up that it could be done. Other irregularities are also suggested as established by the court's findings, but we do not deem it necessary to specify them.

Whatever may be said of the wisdom of the charter requirements, they were nevertheless controlling. If this were a foreclosure of a tax lien under the present general revenue law, with the property owner before the court, then under the liberal construction of the statute adopted by this court in *Smith v. Newell*, 32 Wash. 369, 73 Pac. 369, and approved in the recent case of *Jefferson County v. Trumbull*, ante p. 276, 75 Pac. 876, decided March 11, 1904, the above omissions could probably be corrected by the court. But such is not the case here. We are considering only the validity of a summary sale of property for taxes. It has long been the rule that the outlined statutory procedure leading up to such a sale, and governing the sale itself, must be strictly pursued. We deem it unnecessary to cite authorities in support of a principle so generally declared. The following is, however, a comprehensive statement of the reasons for the decisions:

"The process of collecting taxes by the sale of lands for their non-payment is a summary remedy, and in great meas-

ure *ex parte*. Notwithstanding all the precautions which the law establishes, it is very possible that the owner may be entirely unaware of the proceedings until the sale has been consummated. The power of the collector to sell rests exclusively upon statutory authorization and is derived from no rule or principle of the common law. This power is a naked power, not coupled with an interest. . . . Now, from these considerations it is easy to deduce a general rule. In order that a sale of land for taxes should be valid and unimpeachable, and should pass a good title to the purchaser, it is necessary that all the preliminary requirements of the statutes, made conditions to the exercise of the power, and designating the various proceedings which are to culminate in the sale, should have been strictly complied with, and that the officers who execute the power should follow with precision, in so doing, the course marked out for them by law, and that the conditions subsequent to the sale, if any, should be duly observed. And upon this point the authorities are unanimous." Black, Tax Titles (2d ed.), § 155.

We therefore think, under the rules applying to summary sales for taxes, that, in addition to the one dollar fee first discussed, the various other irregularities above noted—at least, when aggregated—also constituted serious departures from charter provisions, and rendered the certificates of sale void.

It is next insisted by appellant that the action is barred by the statute of limitations, and it is urged that this question was not passed upon in the former appeal. The subject was discussed at length in that opinion. We held that the statute did not begin to run until the actual discovery of the illegal or erroneous issue. We also held, as we have stated here, that the certificate holder was not under any obligation to make investigation that would lead to such discovery. It is now insisted that the fact that the one dollar fee was charged was known to the purchaser from the time of the sale, for the reason that

it was indorsed on the certificate itself. It is, therefore, argued that, since the bare fact was thus brought to his knowledge, the statute must then have commenced to run. Appellant's position is that respondent was chargeable with knowledge of the legal effect flowing from knowledge of the fact. Ordinarily this would be true, but in this instance the city, by its ordinance, undertook for itself to make the discovery, and to notify the certificate holder. Under such circumstances, he was under no obligation to seek legal counsel in the premises, and, at least until he was actually advised of the illegality of the certificates, the statute did not run against him. It was proven as a fact at the trial, and found by the court, that respondent first became aware of the illegality of the certificates in the spring of 1900, when he was so advised by his counsel. This action was commenced in the year 1900. It was therefore begun within time, under any of the statutes of limitations, and it seems unnecessary to discuss the phase of the subject relating to the particular limitation which applies.

Appellant's counsel suggests that this is a case of great importance to the city of Tacoma, and that other cases are now pending in Pierce county involving in the aggregate near \$50,000, which must in effect be determined by the decision in this case. Such conditions, however, do not justify departure from established principles. An effort to do so now would doubtless lead to serious embarrassment and confusion in other cases.

The judgment is affirmed.

MOUNT and DUNBAR, JJ., concur.

ANDERS, J., concurs in the result.

FULLERTON, C. J. (dissenting)—As I cannot agree with the holding that the tax certificates are void, I am compelled to dissent from the judgment ordered by the majority.

[No. 4874. Decided March 24, 1904.]

AMBROSE CARSON *et al.*, Appellants, v. GEORGE W. FOGG
et al., Respondents.¹

ATTORNEY AND CLIENT—ATTORNEY'S PURCHASE OF ADVERSE TITLE—TERMINATION OF EMPLOYMENT—USING INFORMATION AGAINST CLIENT—TRUSTS. Where an attorney buys in an outstanding title adverse to the title of his client, concerning which he was employed, he holds it in trust for his client, even if the employment was terminated, for the reason that he cannot use his information against his client.

SAME. This rule is especially applicable where the attorney was to be paid a certain part of "whatever may be saved, had, received or recovered," since the employment was thereby extended beyond the time of actual litigation, and contemplated a fiduciary relation.

SERVICES—CONTRACT FOR ONE-HALF OF AMOUNT SAVED—ACCOUNTING. Where an attorney defends a foreclosure suit for one-half of whatever may be saved or recovered, and after judgment of foreclosure and sale, undertakes to negotiate a sale to a third person of three of the five lots for a sum sufficient to buy up the certificate of sale, pay all expenses, and \$500 additional, which was paid to the clients for a quitclaim of the three lots, the attorney cannot purchase for his own use the certificate of sale and hold the same for redemption against the remaining two lots, on the theory that his employment had ceased; but, on such purchase, he holds the certificate in trust for the clients; and upon an accounting he is entitled, under the terms of his contract of employment, to one-half of the two lots redeemed by the sale, and one-half of the \$500 paid to the clients.

Appeal from a judgment of the superior court for Pierce county, Huston, J., entered June 4, 1903, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to quiet title. Reversed.

E. W. Taylor, Govnor Teats, and R. H. Lund, for appellants.

George W. Fogg, pro se.

¹Reported in 76 Pac. 112.

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Opinion Per HADLEY, J.

HADLEY, J.—Appellants brought this action to quiet title to certain lots of land in the city of Tacoma. It is alleged that the appellants are the sole surviving heirs of John Carson, deceased, to whom the said real estate belonged in his life time, and that as such heirs they succeeded to ownership of the lots. It is also averred that each of the defendants in the action unjustly pretends to have some claim or interest in the property.

The only defendant who joined issue with the complaint was George W. Fogg. He answered, admitting that he claims an interest in the land, but denying that such claim is unjustly made. He further answered affirmatively, that in May, 1901, his co-defendant, Settlement Company, instituted an action against the plaintiffs to foreclose a certain mortgage upon the lots in question and others, which mortgage was made by the plaintiffs' said father in his life time; that the plaintiffs in this action appeared as defendants in said foreclosure action, answered the complaint, and made defense thereto; that the plaintiff in the foreclosure action recovered a judgment and the mortgaged lands were ordered sold under decree of foreclosure; that the same were sold under the order of sale, and were bid in by the plaintiff in that action, said Settlement Company; that thereafter, by assignment, one Joshua Pierce became the owner of the certificate of sale, and that the same was by him duly sold and assigned to Mr. Fogg, the answering defendant; that said Fogg assigned the certificate to his co-defendant F. S. Pratt, but that afterwards, inasmuch as it was intended to sell and assign to said Pratt only so much of the interest in said certificate as covered and included three lots in block 1302 mentioned therein, the said Pratt assigned to said Fogg so much of the certificate as related to the two lots in question in this action; that said Fogg is now the owner and holder

of so much of said certificate as covers and relates to lots 14 and 15, block 709; that his said holding is subject to the plaintiffs' right of redemption, and constitutes the claim which they allege is unjustly asserted. The reply denies the averments of the affirmative answer. The cause was tried before the court without a jury, and a decree was rendered in favor of the defendant Fogg. The plaintiffs have appealed.

The proofs show that the plaintiffs in this action, when they were defendants in said foreclosure cause, employed H. F. Norris as their attorney to make defense for them in that action, and that they authorized him to associate with him, for his assistants in the defense, any other attorneys whom he chose to select. A written memorandum to the above effect was signed by all the said defendants in the foreclosure action, the plaintiffs here. On the same day the following further written memorandum was signed by three of said defendants, now three of the plaintiffs here. The fourth does not however dispute the correctness of the terms of the memorandum, but acquiesces therein. It is as follows:

"We hereby stipulate and agree that we will pay to Mr. Homer F. Norris, our attorney at law, and to whomsoever he shall associate with him in the management of said cause, a sum equal to one-half of the value of whatever may be saved, had, received or recovered to or for us in, or growing out of, the matter and cause known as the 'Settlement Company, a corporation, Plaintiff, vs. Frank A. Carson, Ambrose Carson, Nellie I. Hadlock, and Hattie S. Adams, Defendants,' the same being cause No. 18701, on the docket of the superior court, Pierce county, Washington, as compensation for their services as our attorneys in said cause."

The proof further shows that said Norris employed the respondent Fogg as his assistant, in pursuance of the

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above written terms, and that the two acted as attorneys of said defendants in making their defense to the foreclosure action. The services of respondent were, therefore, rendered under the terms of said memorandum of agreement. No appeal was taken from the foreclosure decree. The defendants therein, the plaintiffs here, understood that an appeal would be taken, but their said attorneys stated to them that they did not see their way clear to appeal.

Thereafter Mr. Pratt, one of the defendants here, desired to purchase three of the five lots included in said foreclosure decree. The services of respondent Fogg were sought to aid in procuring a good title to the three lots, and he undertook to do so. The purchaser was willing to pay \$8,300 for good title to the three lots. Said sum was over \$800 in excess of the total amount required to redeem all the lots from the said sheriff's sale. The purchaser required a quitclaim deed from appellants for the three lots, as a release of their right to redeem. Appellants say respondent told them he could effect a sale of the three lots for \$1,000 in excess of the amount called for by the certificate of sale, and that \$500 would be for them and \$500 for respondent, thus leaving the other two lots free from any lien. Respondent, upon the other hand, says he simply told them he could get them \$500 for a quitclaim deed to the three lots. In any event, the quitclaim was made by appellants, the \$8,300 was paid by the purchaser, and \$500 to appellants. The certificate of sale was transferred in such a manner, as aforesaid, that respondent Fogg became the assignee of so much thereof as relates to said lots 14 and 15, block 709. Thereafter respondent informed appellants that he was the owner of the certificate of purchase, and that the neces-

sary amount to redeem said two lots was the full amount of the judgment with interest and costs.

Respondent's position seems to be that he himself purchased the whole of the certificate from its then holder; that he has transferred so much thereof as relates to the three lots, but retains the ownership as to the two; that appellants, having for a consideration quitclaimed as to the three lots, cannot redeem as to them, and if they wish to redeem the other two they must pay the full amount of the judgment, in order to release them from the lien. It is furthermore respondent's position that the relation of attorney and client ceased between him and appellants with the close of the foreclosure case, and that he was thereafter as free to traffic in said lands as though that relation had never existed. It is the rule, however, that, even when the employment of an attorney is under an ordinary contract, if he shall buy in an outstanding title adverse to the title of his client, concerning which he has been consulted and employed as counsel, he buys it in trust for his client, if the latter shall elect to take it. This is true, even though the purchase is made after the actual relation of attorney and client has been terminated, for the reason that information acquired while that relation exists cannot thereafter be used by the attorney against his client. *Eoff v. Irvine*, 108 Mo. 378, 18 S. W. 907, 32 Am. St. 609; *Smith v. Brotherline*, 62 Pa. St. 461; *Davis v. Smith*, 43 Vt. 269; *Trice v. Comstock*, 121 Fed. 620, 61 L. R. A. 176; *Henry v. Raiman*, 25 Pa. St. 355, 64 Am. Dec. 703.

In *Trice v. Comstock*, *supra*, the court, at page 625, observed:

"Nor is it any defense to the suit to enforce this trust that the agency had terminated before the confidence was violated. The duty of an attorney to be true to his client,

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or of an agent to be faithful to his principal, does not cease when the employment ends, and it cannot be renounced at will by the termination of the relation. It is as sacred and inviolable after as before the expiration of its term."

The above authorities, and others that might be cited, hold that the attorney is, under ordinary circumstances, prohibited from speculating against his client's interest in the subject-matter of the litigation, even after the relation of attorney and client has ceased.

If such is the rule under an ordinary contract of employment, the necessity of its application here is certainly emphasized, because of the peculiar and specific terms of the contract of employment. By reference to its terms as set out above, it will be observed that client and attorney are to share in the "value of whatever may be saved, had, received, or recovered." The terms of that contract necessarily extend beyond the time of actual litigation, and continue the relation of attorney and client until such time as all lands or moneys saved from the subject-matter of the litigation have been finally distributed between the two. The contract contemplated a fiduciary relation, which should in trust carefully account for everything of value not required to discharge the mortgage obligation, its attendant costs, and necessary expenses of the trust itself.

Respondent has been misled by the view that he was no longer an attorney in the premises. In his brief he frankly says that, if he was in error, he will gladly submit himself to the judgment of the court, "not being willing to profit in any manner through any act that may be thought to be of questionable professional propriety." We must therefore determine what relief shall be granted in the premises. It is clear, from what has been said, that there has already come into what we have called

"the trust" between attorney and client \$8,300 in money, and the two lots frequently mentioned above. The money was received by respondent, and the court found that he paid upon the mortgage indebtedness \$7,454.60, \$300 to one Balkwill for services as a broker, \$500 to these appellants, and \$35.29 to an abstract of title company. The above items make a total paid out of \$8,289.89, and leave a balance of \$10.11 cash in respondent's hands. Appellants dispute the correctness of the items as to broker's services and abstract fee. We shall not undertake to say, however, that those expenditures may not have been necessary in behalf of the trust, in order to effect the sale which was made and the consequent advantageous results. From the finding of the court, the money was at least paid out by respondent, and he has received no benefit therefrom other than what may have resulted as benefit to the trust.

Thus the respective parties to the trust now hold as follows: Appellants, as the clients, upon the one hand, \$500 in cash; and respondent, for the attorneys, upon the other, \$10.11 in cash, and the certificate of sale for the two lots. An equal division of value should be effected, and such a decree rendered as will quiet the title of appellants to the undivided one-half of said two lots, and of respondent to the other undivided half. The total net cash in the hands of the trust is \$510.11. One half thereof, to which respondent is entitled, is \$255.05. Since he has received \$10.11, the balance due him is \$244.94. The decree should provide that appellants' interest in the land is subject to a charge of said last named sum in favor of respondent, with legal interest thereon from the date of the decree, and that the property shall remain subject to said charge as a lien until it shall be paid, or until the

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Syllabus.

affairs of the trust shall be mutually settled; provided, however, that, if the amount shall not be paid by settlement of the affairs of the trust, or otherwise, within one year from date of the decree, execution may thereafter issue against appellants' interest in the land, and the same may be sold in the manner of ordinary sales under execution to satisfy said charge.

The judgment is reversed, and the cause remanded with instructions to the trial court to enter a decree as above indicated.

FULLERTON, C. J., and ANDERS, DUNBAR, and MOUNT, JJ., concur.

[No. 4950. Decided March 25, 1904.]

GEORGE TAYLOR, JR., *Respondent*, v. CHANDLER HUNTINGTON *et al.*, *Appellants*.¹

COURTS—JURISDICTION—TAXATION—SPECIAL PROCEEDINGS TO ENFORCE LIEN—PRESUMPTIONS IN AID OF JURISDICTION—VACATION OF JUDGMENTS. Where special and summary powers are conferred upon courts of general jurisdiction for the enforcement of tax liens, the judgment therein imports the same verity, and raises the same presumption as to the facts essential to jurisdiction, as in the case of judgments in the ordinary course of the common law by a court of general jurisdiction, there being no valid reason for any distinction, under our constitutional provisions respecting the jurisdiction of superior courts; and such a judgment will not be vacated because all the steps conferring jurisdiction do not appear in the record.

TAXATION—PROCEEDINGS TO ENFORCE—WHAT LAW GOVERNS. Proceedings to enforce a tax need only conform to the law in force at the time of the commencement of the action.

Appeal from an order of the superior court for King county, Tallman, J., entered July 17, 1903, refusing to

¹Reported in 75 Pac. 1104.

34	455
124	700
84	456
86	106

vacate a judgment entered July 12, 1901, foreclosing a lien for taxes. Affirmed.

John K. Brown and J. A. Kellogg, for appellants.

Reed & Rutherford, for respondent.

DUNBAR, J.—On the 15th day of March, 1901, the respondent George Taylor, Jr., filed with the clerk of the superior court of King county his application for judgment foreclosing a tax lien or certificate of delinquency, issued April 6, 1898, on the real property therein described, for the years 1894-5-6, in the sum of \$67.85, and interest. The application alleged the issuance of the certificate, and the payment by respondent, on the 6th day of April, 1900, of the taxes on said property for the years 1897-8-9. There is no allegation of the payment of the taxes for the year 1900. The application also alleges that more than three years have elapsed since the delinquency of said taxes, and their nonpayment, and prays for judgment of foreclosure and sale, etc. The summons and notice were returned by the sheriff of King county with the endorsement that the defendants could not be found, and, on the application of one of respondent's attorneys, service was made by publication. No appearance was made, and on the 12th day of July, 1901, judgment was rendered foreclosing the tax lien, and ordering a sale of the property, which was thereafter sold to respondent, who is now in possession under said sale. On the 18th day of February, 1903, the appellants, the owners of the property, made a motion to set aside and vacate the judgment, for the reason that the same was void for lack of jurisdiction in the court to render the same, which motion was subsequently denied; and, upon appeal from the order denying said motion, the case is now before this court.

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Opinion Per DUNBAR, J.

The appellants contend that the judgment rendered by the superior court is void for want of jurisdiction in said court to render the same, for the following reasons: (1) The affidavit of publication of the publisher of the newspaper in which the notice and summons were published does not state that said newspaper, the White River Journal, was printed in King county, as required by § 4878, Bal. Code; § 336, Pierce's Code. (2) It does not appear in the application for judgment, the recitals in the judgment, or elsewhere in the record, that the respondent (the holder of the certificate of delinquency foreclosed), or any one else, had, before applying for the judgment, paid all the taxes which had accrued on the property, particularly the taxes for 1900, as required by § 107 of the revenue law. § 8699, Pierce's Code; Laws 1897, p. 188. (3) It nowhere appears in the record that a copy of the notice was delivered to the county treasurer as required by subdivision 5 of § 96 of the revenue law. § 8691, Pierce's Code; Laws 1901, p. 385. (4) The summons published was not in accordance with the statute, and its publication did not confer upon the court jurisdiction to render the judgment of foreclosure herein.

The principle contended for by the appellants, for the purpose of overthrowing this judgment, is that the rule that the judgment of a court of general jurisdiction imports absolute verity, and that all the necessary steps leading up to the judgment will be presumed to have been complied with, does not apply where a court of general jurisdiction has conferred upon it special and summary powers, wholly derived from statutes, and which do not belong to it as a court of general jurisdiction, and when such powers are not exercised according to the course of common law; that, in such case, its decisions must be regarded and

treated like those of courts of limited and special jurisdiction, and no presumption of jurisdiction will attend a judgment of the court, but that the facts essential to the special jurisdiction must appear on the face of the record; the contention being that the superior courts in this state are courts of general jurisdiction over all cases arising in the ordinary course of common law or of chancery. And it is conceded, under the rule announced above, that when, proceeding within such jurisdiction, they have proceeded to judgment according to the usual course of such proceedings, their judgments import absolute verity, and raise the presumption that all the facts necessary to confer jurisdiction exist; but it is argued that the case at bar discloses a case where the procedure arises under special jurisdiction, conferred upon the superior courts by the revenue laws of the state, and that the steps conferring jurisdiction for the rendering of the judgment must appear in the record. *Harvey v. Tyler*, 2 Wall. 328, 17 L. Ed. 871; *Galpin v. Page*, 18 Wall. 350, 21 L. Ed. 959; *McClung v. Ross*, 5 Wheat. 116, 5 L. Ed. 46; *Pulaski County v. Stuart*, 28 Grat. (Va.) 872; and Freeman, Judgments (3d ed.), § 123, are cited to sustain this contention.

Harvey v. Tyler, *supra*, does not seem to us to bear out the contention of the appellants. In distinguishing the case of *Kempe's Lessee v. Kennedy*, 5 Cranch 173, 3 L. Ed. 70, from the case under consideration, the court said:

"It is certainly true that there is a class of tribunals, exercising to some extent judicial functions, of which it may be said, in the language of Chief Justice Marshall, that they are [quoting from the case of *Kempe's Lessee*] 'courts of a special and limited jurisdiction, which are created on such principles, that their judgments taken alone are entirely disregarded, and the proceedings must show their jurisdiction;'"

and, after discussing the distinction contended for, said:

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"The transcripts of the judgments of exoneration produced in this case, show that there were proper parties before the court, that the subject-matter of the exoneration of the land from delinquent taxes was before it, and that it rendered judgments exonerating it from all delinquent taxes. Can it be required to give validity to these judgments, that the record shall show that every fact was proved, upon which the judgment of the court must be supposed to rest? Such a ruling would overturn every decision made by this court upon that class of cases, from that of *Kempe's Lessee v. Kennedy*, already referred to, down to the present time;"

and the judgment was affirmed.

McClung v. Ross, *supra*, does not seem to us to support the contention claimed, and *Pulaski County v. Stuart*, *supra*, based its decision upon the fact that the duty of the court was ministerial rather than judicial, saying:

"But where a court of general jurisdiction has conferred upon it special and summary powers, wholly derived from statutes, and which do not belong to it as a court of general jurisdiction, and when such powers are not exercised according to the course of the common law, its action being ministerial only and not judicial, in such case its decision must be regarded and treated like those of courts of limited and special jurisdiction, and no such presumption of jurisdiction will attend the judgment of the court. But in such cases the facts essential to the exercise of the special jurisdiction must appear upon the face of the record."

Galpin v. Page, *supra*, is a noted case, and much is there said which supports the distinction contended for by the appellants, although the main reason for the rendition of the judgment in that case was that verity should not be imputed to a judgment where the service was a service by publication instead of a personal service, and that, where a certain state of facts was shown by the record, it was not competent, in aid of the judgment, to conclude that certain other facts had been presented to the court.

Freeman on Judgments, however, after noticing the cases apparently maintaining the distinction, says, at § 123:

"The doctrine that the judgment of the courts of record are of any less force, or are to be subjected to any closer scrutiny, or that they are attended with any less liberal presumptions, when created by virtue of a special or statutory authority, than when rendered in the exercise of ordinary jurisdiction, has been repudiated in some of the states; and the reasons sustaining this repudiation have been stated with such clearness and force as to produce the conviction that the doctrine repudiated has no foundation in principle, however strongly it may be sustained by precedent;"

citing *Hahn v. Kelly*, 34 Cal. 391, 94 Am. Dec. 742, and *Eitel v. Foote*, 39 Cal. 439, in support of that view, these cases determining squarely that no such distinction exists.

This court, also, has spoken upon this subject, in a case exactly in point, viz., *Kizer v. Caulfield*, 17 Wash. 417, 49 Pac. 1064, where *Eitel v. Foote*, *supra*, was cited with approval, the court saying:

"Now, if the judgment sought to be avoided in this case has the same force and effect as a judgment of the same or a like court in any other action, it follows that, if valid, that judgment and the sale made under it effectually and completely cut off all right and title of the defendant Hawthorne, respondent's mortgagor, to the premises in question; and the said Hawthorne, not having redeemed the same from the sale, had thereafter no interest therein subject to mortgage or sale. And that such a judgment stands upon the same footing as a judgment in an ordinary action seems to us too plain for argument. But we are, however, not without authority upon the proposition. The point was raised and expressly determined in the case of *Eitel v. Foote*, 39 Cal. 439, in which the court said that the validity of the judgment in a tax suit is to be ascertained by the same tests, has the benefit of the same presumptions, and is subject to attack in the same mode and by the same means, as a judgment in an action of any other class."

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In discussing this proposition, Mr. Black, in his work on Tax Titles (2d ed.), § 178, concludes:

"It should be remarked, however, that in several of the states, a different view obtains as to the nature of the jurisdiction of the courts in these proceedings. In these states it is held that the statute authorizing such proceedings does not create and confer any special and limited jurisdiction upon the courts, but simply gives to the state, county or municipality, as the case may be, an additional remedy therein to collect its taxes and foreclose its tax liens against certain real property under certain conditions. Thus, the designated courts have a general jurisdiction over the subject-matter. And it follows as a consequence from this view that the validity of a judgment in a tax suit is to be ascertained by the same tests, has the benefit of the same presumptions, and it is subject to attack in the same mode, as a judgment of a court of general jurisdiction in an action of any other class;"

citing *Driggers v. Cassady*, 71 Ala. 529; *Young v. Lorrain*, 11 Ill. 637, 52 Am. Dec. 463; *Gunn v. Howell*, 27 Ala. 663, 62 Am. Dec. 785; *Wellshear v. Kelley*, 69 Mo. 343; *Eitel v. Foote*, 39 Cal. 439; *Carlisle v. Watts*, 78 Ala. 486; *Prout v. People*, 83 Ill. 154; *Turner v. Jenkins*, 79 Ill. 228.

And this view must be correct under our constitutional provisions, for it is by the constitution that the jurisdiction is conferred, and, as was forcibly said by Judge Stiles, in *In re Cloherty*, 2 Wash. 137, 27 Pac. 1064:

"The state of Washington is a sovereign whose written constitution is her visible charter. By the constitution all the judicial power (which is a distinct branch of the sovereignty) is vested in the courts therein created, independently of all legislation. The jurisdiction of these courts is universal, covering the whole domain of judicial power, even to that growing out of the supposed existence of municipal ordinances."

But, outside of authority, there seems to us to be no reason which supports the distinction sought to be maintained. The reason why verity is imputed to the judgment of courts that are called courts of general jurisdiction or courts of record, as distinguished from courts of limited jurisdiction or inferior courts or tribunals, doubtless is that courts of the first class are presided over by men who are presumed to be learned in the law, aided and advised by practitioners who are also learned in the law; while courts of the other class are presided over by men of more limited learning and experience. But certainly it is the court upon which the distinction is conferred, rather than the accident of circumstances under which the same court is dealing on different occasions. The judgment of the court is equally entitled to credit whether the jurisdiction is generally or specially conferred. Under the provisions of our constitution the superior court is constituted a court of general jurisdiction, and it remains a court of general jurisdiction in the exercise of all its judicial functions, no matter whether it is exercising its jurisdiction under the provisions of the common law, of the constitution, the probate, or any other branch of statute law. To be compelled to stop to inquire and determine whether the jurisdiction conferred upon the court was a common law power, or whether it was expressly conferred by constitutional or statutory enactment, before the validity of its judgment, or the verity to be imputed to such judgments, could be determined, would be unnecessary, inconvenient, illogical, and confusing, and not in harmony with the spirit of our code and constitution.

In addition to this, the third and fourth objections are answered by the fact that the requirements there spoken of were not made by the law in force at the time of the commencement of the action, and this court has said that the

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statute in force at the time an action was instituted governs in all matters of procedure. *Woodham v. Anderson*, 32 Wash. 500, 73 Pac. 536.

The judgment is affirmed.

FULLETON, C. J., and MOUNT, HADLEY, and ANDERS, JJ., concur.

[No. 4903. Decided March 25, 1904.]

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*ROBERT MUIR, as Receiver of the Scandinavian-American Bank, Appellant, v. G. H. WESTCOTT, Respondent.*¹

POWER OF ATTORNEY—CONSTRUCTION—EXTENT OF AUTHORITY—POWER TO SELL FIXTURES FOR BENEFIT OF CREDITORS. A power of attorney from the owner of a bank authorizing an agent as attorney in fact to take charge of all property and effects of the principal, especially the properties known as said bank, to direct its policies, vote its stock, and, after specifically describing stocks and securities to be sold for the purpose of security for loans or advances, granting full authority to hypothecate, assign, and transfer any and all of the property above set forth, and to do all things advisable, in the discretion of the agent, whether the power is explicitly set forth or not, authorizes the sale of the safe and fixtures of the bank to a trustee for the benefit of its creditors.

SAME—ORAL EVIDENCE EXPLAINING WRITTEN POWER OF ATTORNEY. In such a case a cablegram to the attorney in fact directing him to take charge and make the best settlement for creditors possible, is not inadmissible as varying the terms of the written power, as it only tends to explain it, if any explanation was necessary.

APPEAL—REVIEW—HARMLESS ERROR. The admission of immaterial evidence is harmless in a case tried *de novo* on appeal.

Appeal from a judgment of the superior court for Whatcom county, Neterer, J., entered April 2, 1903, upon findings of the court, dismissing on the merits a garnishment proceeding, with costs against the plaintiff. Affirmed.

¹Reported in 75 Pac. 1107.

Everett C. Ellis, for appellant. The power of attorney did not authorize the sale of fixtures for the benefit of creditors. *Gilbert v. How*, 45 Minn. 121, 47 N. W. 643, 22 Am. St. 724; *Bliss v. Clark*, 16 Gray 60; *Rountree v. Denson*, 59 Wis. 522, 18 N. W. 518; *Weston v. Alley*, 49 Me. 94; *Holmes v. Morse*, 50 Me. 102; *Lawrence v. Gebhard*, 41 Barb. (N. Y.) 575; *Gouldy v. Metcalf*, 75 Tex. 455, 12 S. W. 830, 16 Am. St. 912; *Anderson v. Bigelow*, 16 Wash. 198, 47 Pac. 426. The power to attend to the business does not include a power to sell. *Coquillard's Adm'r v. French*, 19 Ind. 274; *Ashley v. Bird*, 1 Mo. 640, 14 Am. Dec. 313; *Rossiter v. Rossiter*, 8 Wend. 494, 24 Am. Dec. 62; *Ward v. Thrustin*, 40 Ohio St. 347; *Holbrook v. Oberne*, 56 Iowa 324. And a power to sell does not include the power to make a voluntary conveyance. *Stocker v. Foster*, 178 Mass. 591, 60 N. E. 407; *Garland v. Smith*, 164 Mo. 1, 64 S. W. 188; *Harty v. Doyle*, 49 Hun 410; *Taylor v. Haskell*, 178 Pa. St. 106, 35 Atl. 732.

Dorr & Hadley, for respondent.

DUNBAR, J.—On the 2d day of May, 1901, one S. M. Bruce, claiming authority to act under power of attorney from one H. St. John, principal defendant in this action (who was the owner of a bank situated in Whatcom county, Washington, known as the Bank of Blaine, and was also the owner of stock and interests in various other banks in the state of Washington), executed and delivered to G. H. Westcott, garnishee and respondent herein, a bill of sale of the safe, fixtures, stationery, and books of said bank. On the same day, and as part and parcel of the same transaction, said Westcott executed a declaration of trust, by which he agreed to dispose of the property above mentioned for the benefit of the creditors of the Bank of Blaine. In

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pursuance thereof, Westcott sold the property referred to in said bill of sale, and proceeded to disburse the funds thereby obtained, but, before they had all been disbursed, appellant caused to be served upon him a writ of garnishment, to which Westcott made answer, declaring that he still had in his possession \$400.60 belonging to said trust, but denying that said funds belonged to defendant. This answer was controverted by the appellant.

Before the case came on for trial, appellant made demand for a copy of the bill of sale, which said copy was furnished, and disclosed that it had been executed by S. M. Bruce, attorney in fact for H. St. John. Bruce testified that he had executed, and delivered to Westcott, the instrument under discussion, which is exhibit "A" in this case, and received from Westcott the declaration of trust, which is exhibit "C." Mr. Bruce was then permitted, over the objection of appellant, to testify that he had received a cablegram from London, from H. St. John, in cipher, which interpreted read: "Take charge and make best settlement for creditors possible."

The court found that St. John, through his authorized agent and attorney in fact, S. M. Bruce, sold, assigned, and transferred unto said garnishee defendant, G. H. Westcott, those certain bank fixtures situate in and belonging to the Bank of Blaine, of which said bank the said H. St. John was proprietor, the property in controversy here being the safe, furniture, fixtures, etc., of the Bank of Blaine; that Bruce had authority to so dispose of said property, and that the property had passed from the possession of the defendant St. John; that, by reason of the premises, said sum of \$400.60 was held in trust by said garnishee defendant for the use and benefit of the creditors of said Bank of Blaine; and that no part of said sum belonged to the defendant H. St. John, or to any person other than said

creditors; and that the said garnishee defendant was not, at the time of the writ of garnishment, indebted to the said defendant H. St. John, and had not then any effects or property belonging to said H. St. John; found, also, that it was necessary for said garnishee defendant to employ counsel in the proceedings that had been brought against him, and that a reasonable sum as attorneys' fees for the services of his attorneys in this behalf is \$40. Judgment was entered accordingly, dismissing the garnishment proceedings, and adjudging costs against the plaintiff, and entering judgment against the plaintiff for the sum of \$40 attorneys' fees.

The power of attorney, on which the defense in this case rests, is as follows:

"This Indenture Witnesseth: That H. St. John, hereinafter called the first party, has made and does hereby make, constitute and appoint S. M. Bruce, of Whatcom county, Washington, hereinafter called the second party, his true and lawful attorney in fact, to do and perform each and all and singular the following acts and things: The first party does hereby empower the second party in the name, place and stead of the first party, to take charge of all property, credits and effects belonging to the first party, or in which the first party has any interest, situated in the state of Washington, and especially in the county of Whatcom, and especially those properties known as the Bank of Blaine, the Citizens' National Bank of Fairhaven, and the Scandinavian-American Bank of New Whatcom, all in Whatcom county, Washington, and to direct the policies of said properties, and to attend any meeting or meetings of stockholders of said property that may be called or held in the absence of the first party from the said county, and to vote said stock at any meeting of stockholders in the name and stead of the first party as fully and to the like purpose as if the first party were present and acting in person, and the second party is hereby further empowered to negotiate and sell said stocks as security

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for any loan or advance which the second party may be able to obtain on said stocks and securities, or any part or number of them, the said second party being hereby fully empowered to negotiate loans, and to execute and sign evidences of indebtedness for the purpose of raising money upon said stocks or properties as fully and to the like purpose as if the first party were present and acted in person; and the said second party is also empowered to give receipts, collect money, and to do generally all things incident to the business and business interests of the first party, the first party hereby confirming and ratifying all and singular every act or thing done by the second party under the powers here granted, whether the power to so act has been explicitly set forth or not, if the same is found to be convenient or advisable within the discretion of the second party, full authority being hereby given the second party to hypothecate, assign and transfer in the name of the first party any and all of the securities, stocks or property above set forth; and whatsoever act or thing the second party may do under the powers aforesaid, or in the exercise of any discretion or incidental act necessary to the carrying out of said powers, the first party will and does hereby ratify and confirm irrevocably and unconditionally."

This instrument was duly signed and acknowledged by H. St. John. It is earnestly contended by the appellant that no authority was conferred upon Bruce to dispose of the furniture of the bank for the benefit of creditors, or at all. The argument is that it was only the stock or securities which he was empowered, in any event, to dispose of; that under the law all powers of attorney receive a strict interpretation, and that the authority is never extended by intendment or construction beyond that which is given in terms, or is absolutely necessary for carrying the authority into effect, and that authority must be strictly pursued. This power of attorney is so definite and explicit that it is difficult to discuss it, and, conceding the rule con-

tended for by the appellant—that, where there is a power of attorney to do a particular act followed by general words, these general words are not to be extended beyond what is necessary for doing that particular act for which the power of attorney is given—yet we think the power to sell the property under discussion was plainly and specifically given by the instrument executed. The attorney in fact, at the very commencement, is not only empowered to take charge of the banks described therein so far as stocks, securities, and money on hand is concerned, but he is empowered to take charge of all property, credits and effects. The safe and other furniture of the bank are property, and they are effects belonging to the Bank of Blaine in the county of Whatcom, and the instrument recites that it especially refers to the property known as the Bank of Blaine. It is true that power is given to direct the policies of said property, to attend meetings of stockholders, etc., and it is urged by the appellant that there is no such thing as directing the policies of the fixtures of the bank. But the defendant, in his anxiety to confer absolute authority and to escape the rule with relation to general authority which appellant is now invoking, undertook to specify authority to act in any emergency which should arise. It might become necessary, in the administration of the business of the banks, to attend meetings of stockholders and to vote said stock, and not necessary to sell any of the property of the bank, stock, or assets, or effects, or anything else. It might become necessary to attend such meetings and also to sell and assign the stock and all the other property of the bank, and the instrument, in more than one instance, empowers the attorney in fact to sell the properties of the bank, after specifically describing stocks and securities. So that it was within the evident contemplation of the defendant, St. John, that other

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property than stock or securities should be controlled by the attorney in fact; and this power of attorney is particularly expressive in conveying power to do all things necessary to be done in the premises, whether the power to so act has been explicitly set forth or not, the only limitation being that it must be found to be convenient or advisable within the discretion of the second party. We think no error was committed by the court in finding that the attorney in fact did not exceed his authority in the execution of the bill of sale to Westcott.

It is also insisted by the appellant that the court erred in admitting the testimony of Mr. Bruce, in relation to the additional instruction he received from defendant St. John by cablegram, to the effect that he should take charge and make the best settlement for creditors possible. As we have often said, the admission of immaterial testimony in the lower court, where the case is tried *de novo* in this court, would not authorize a reversal of the judgment, but this court will disregard the testimony, if it finds it immaterial, and try the cause on the testimony which is properly introduced. Although, in our judgment, there was no technical error in admitting this testimony; its effect was not to vary the terms of the written authority; it only tended to explain the written instrument, if any explanation was necessary, and oral testimony in such cases is permissible for the purpose of explaining or expanding the written authority.

We do not conclude, from an investigation of the record, that the court abused its discretion in refusing to grant a new trial on the ground of newly discovered evidence, or on any other ground. The judgment is affirmed.

FULLERTON, C. J., and MOUNT and ANDERS, JJ., concur.

[No. 4881. Decided April 1, 1904.]

JOSEPH METZLER, *Appellant*, v. GEORGE MCKENZIE,
Respondent.¹

MASTER AND SERVANT—SAFE PLACE—FALL OF TEMPORARY STAGING—CONSTRUCTION BY FELLOW-SERVANTS—SERVANTS EMPLOYED TO PREPARE PLACE. A carpenter cannot recover for personal injuries caused by the breaking of a defective plank used in the construction of a temporary staging erected by a fellow-carpenter, without any supervision by the employer or his foreman, where the carpenters at work on the building, including the plaintiff, were employed, and it was customary for them, to erect their own staging, and the employer furnished suitable material for the purpose, and provided competent co-servants, who failed to discover the defect in the plank on inspection, and no one had any notice thereof, since the negligence, if any, was that of a fellow-servant, and the rule as to the master's liability to furnish a safe place does not apply where the preparation of the place is itself a part of the work which the servants were employed to perform.

SAME. An order from the foreman to a fellow-carpenter to construct such staging does not constitute him a vice-principal while constructing the same.

Appeal from a judgment of the superior court for Snohomish county, Denney, J., entered April 11, 1902, upon granting a nonsuit at a trial before the court and a jury, in an action for personal injuries sustained by a carpenter in a fall from defective staging. Affirmed.

John Tobin and Brownell & Coleman, for appellant.

Wilshire & Kenaga, for respondent.

PER CURIAM.—Action brought by Joseph Metzler, plaintiff, against George McKenzie, defendant, in the superior court of Snohomish county, to recover compensation for personal injuries. Plaintiff was nonsuited at the trial, and appeals.

¹Reported in 76 Pac. 114.

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The only assignment of error is the granting of the nonsuit by the trial court. Appellant received the injuries of which he complained on or about the 20th day of September, 1901, while he was employed by the respondent as a carpenter in the construction of a brick building in the city of Everett. Benjamin Thomas was the foreman of the carpenter work on this structure. Thomas employed appellant, and had the authority to employ and discharge men in that line of work.

This building had progressed, at the time of the accident, to the laying of the joists just beneath the roof at the top of the third story. To hold these joists in position, a piece of wood called "bridging" is nailed thereto, extending from the top of one joist to the bottom of the next. In order to nail on the bottom part of this bridging, it was necessary to build a scaffold on which the carpenters could stand while at work. This bridging is sawed at a proper angle at each end, in order that it may be nailed against the joists. The sawing is done in what is called a "mitre box," which is a rough three-sided box without top or ends, into the two upright sides of which slits are sawed at the proper angle. The piece of bridging is laid in the box, and the workman saws it through these slits to give it the proper angle. The continuous sawing of bridging has the effect of making a saw cut into the bottom on the box.

It appeared from the testimony produced in appellant's behalf that, on the afternoon of the day of the accident, appellant and G. C. Kiehl, a fellow-carpenter, were at work on the top of the roof joists of the building in question, when foreman Thomas came up where the carpenters were at work and gave them directions for their further work. Mr. Kiehl testified on this branch of the case as follows:

"Q. What did he tell you? A. Well, we was getting near the end of that work, and he says for a couple of us to go down and build a staging and finish nailing the bridging, and the rest could go down on the other floor; and I said, 'Will I go down and build the staging?' and he says, 'Yes;' so I started down and went to building the staging. Q. Who went with you? A. Nobody. Q. Who helped you in building that staging? A. Well, Van Bergen was piling up some planks, and pulling them up from below, and he handed up some planks to me. Q. He handed you the material did he? A. Yes, sir. Q. Did you do the entire construction work yourself? A. I did. Q. Explain to the jury just how you built the staging? A. Well, the staging was built along in the front part of the room . . . ; there is a partition running over here, the joists running up and down, and I nailed the plank on the joists and let the other end go over on a part of the window like that; and after I had that done, I took some planks and laid them across the braces, for us to walk on to nail the bridging in the joists overhead."

Witness further said that those planks were about eight feet from the floor, that the ceiling at that place was fourteen feet high, and could be reached easily from the planks. Foreman Thomas was on the third floor when Kiehl commenced to build this scaffold, but gave no directions as to details. The material used in its construction was taken by Van Bergen from a pile of lumber, and handed to Kiehl as he needed it. In this pile there was a plank which had once been used for the bottom of a mitre box, and was sawed nearly half-way in two. As this plank was laid in the pile, the saw cut was down, and Van Bergen, without noticing the cut, raised and handed the plank to Kiehl, who laid it on the cross pieces with the cut on the under side. Kiehl and Van Bergen knew nothing of this cut before the time of the accident. Both were inspecting planks for knots, but not for saw cuts, and found the plank with the cut particularly free from knots. In appearance

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the plank was new, like the rest of the lumber that had come from the mill with the general bill of lumber used in the building. There were other sound planks in the pile which could have been used in its place. Appellant in his brief admits that "Kiehl and Van Bergen were competent men in their respective positions."

Appellant Metzler testified that it is customary for carpenters to put up temporary staging while engaged at work on buildings. The testimony also showed that Thomas was a competent foreman, that he was not present when the planks were handed up, that Metzler, having finished the job on the roof, went to foreman Thomas, who was then on the floor of the third story, for orders. Thomas told him to go and help Kiehl nail the bridging. Metzler went upon the roof, procured his hammer, walked over the roof joists to a place just above the scaffold, and swung himself down to the floor of the scaffold at the west end. Metzler started nailing from the west, moving, as he worked, towards the east end of the building. Kiehl was working from the opposite direction towards Metzler. It so happened that these parties met on this plank with the saw cut on its underside. At the time of the accident, Metzler was reaching up in the act of driving a nail. When Kiehl moved towards him, the plank broke suddenly at the place of the cut, throwing both men to the floor. Kiehl escaped unhurt, but appellant's wrist was broken, and he sustained other injuries. It is not pretended that respondent, or his foreman, Thomas, had any knowledge as to the saw cut in this plank. Appellant, at the time of this accident, had been working on the building in question over one month. He swore that he did not know of the cut in this plank when he stepped on to this scaffold.

This court has, by repeated decisions, affirmed these legal propositions: (1) It is a positive duty which the

master owes to his employee to furnish such employee with reasonably suitable and safe machinery, means, and appliances for doing the work which the servant is employed to do, and to provide him a reasonably safe place in which to work; that, this duty being one which the master is positively bound to perform in the first instance, he cannot be excused from its performance by intrusting it to another charged with the duty to make performance for him, but who neglects to discharge that duty. (2) If the master furnishes his employee with adequate machinery, means, and appliances, and a safe place for the performance of his work, exercises reasonable care in keeping them in order and proper repair, and provides competent fellow-servants, then the master is not responsible to one servant for the negligence of another servant in the management and use of the machinery and appliances furnished for performing his work. (3) If, then, one servant shall be injured through the negligence of a fellow-servant while at work in the line of his employment, this is considered a risk incident to the employment, and the master is not liable. Many illustrations of the application of these principles of law are furnished by the decisions. The following are some of the decisions by this court bearing on these propositions of law, which may be cited in this connection: *McDonough v. Great Northern R. Co.*, 15 Wash. 244, 46 Pac. 334; *Johnson v. Bellingham Bay Imp. Co.*, 13 Wash. 455, 43 Pac. 370; *Allend v. Spokane Falls & N. R. Co.*, 21 Wash. 324, 58 Pac. 244; *Shannon v. Consolidated etc. Mining Co.*, 24 Wash. 119, 64 Pac. 169; *Hammarberg v. St. Paul etc. Lumber Co.*, 19 Wash. 537, 53 Pac. 727; *Towle v. Stimson Mill Co.*, 33 Wash. 305, 74 Pac. 471.

The question for the consideration of this court is, how do these principles of law affect the main issue raised

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upon this record? The counsel for appellant contend that the case at bar falls within the reason of the rule announced in *Johnson v. Bellingham Bay Imp. Co.*, *supra*. We fail to discover the analogy. This court there held that the master was liable to the servant for injuries sustained by reason of the breaking of a rotten plank in the master's wharf, over which the servant was required to wheel heavy trucks. It appeared that the master had knowledge of such defect two days prior to the accident. The record in the present controversy fails to disclose that respondent, Thomas the foreman, Kiehl the fellow-carpenter with appellant, or Van Bergen the helper, before or at the time of the accident, knew of the condition of the plank in question which caused the injuries for which appellant seeks to recover damages in this action.

The appellant argues that, inasmuch as the foreman, Thomas, had directed Kiehl to go and build the scaffold, the latter was not, while engaged in the work of construction, a fellow-servant, but a vice-principal. We have carefully examined the authorities cited by appellant in support of such contention, and, after making an extended research with reference to the rules of law applicable to the facts of this controversy, we are impelled to the conclusion that appellant's position in this respect is untenable.

His counsel urge that the case of *Kansas City Car etc. Co. v. Sawyer*, 59 Kan. 778, 53 Pac. 91, is substantially on all fours with the case at bar. The decision in that case was by an intermediate appellate court in the state of Kansas. Plaintiff, Sawyer, while in the employ of the Car & Foundry Company as a carpenter, was injured by the falling of a scaffold on which he was working. One Girard, the carpenter foreman, ordered Sawyer to go to work on such scaffold. The following statement of facts appears in the body of the opinion of the court:

"The immediate crew with which Sawyer was working consisted of himself, Arnett, Warnick, and Williams, all carpenters, and Charles Chase, a laborer. The scaffold consisted of braces, brackets, and planks. It does not appear when or where the brackets were constructed. There is some evidence tending to show that they were shipped from Birmingham, Mo. The braces for the scaffold were taken from a pile of culled lumber, oak and maple, near the work, some of which was suitable for braces and some not. The defect in the construction of the scaffold was a weak, cracked, knotty, cross-grained brace, which was insufficient to hold up the burden that was necessarily placed upon it.

"It appears that, two or three days before the accident occurred, Chase, at the request of Girard, went to this pile of lumber and selected other timbers to put in the place of the old braces then in use, and that he made the selection of the brace which broke. Chase did not look to see whether the timbers selected by him for braces were cracked, cross-grained, or knotty; however, he did see cracks in the timber that broke. The scaffold was constructed under the direction of Girard, the foreman, in such manner that it could be easily taken apart, removed, and joined together. Sawyer certainly had nothing to do with constructing the brackets, selecting the plank, or selecting timbers for braces; these were all under the direction of the foreman. The scaffold was constructed and a portion of it, at least, was in place when Sawyer was directed to that place for work on the morning of the 13th. Some of the men who constructed the scaffold testified that it was sufficient to hold two persons, but was not intended to hold the weight which was afterwards placed upon it. The laborer who selected the timbers for braces was certainly not the most competent person for that purpose. He did not examine the lumber for the purpose of ascertaining whether it was straight or cross-grained, or whether it had knots or cracks; and yet, when some of these defects were discovered, he selected it and permitted it to be used without making known the defects discovered. . . . Nei-

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ther Sawyer nor his colaborers selected the defective timber. It was selected by Chase at the request of the company's foreman."

The court held that the company was liable. We discover nothing in that case to distinguish it in principle from any of the authorities above cited from this court—particularly the case of *Johnson v. Bellingham Bay Imp. Co., supra*. In the action at bar, had foreman Thomas directed Kiehl and Van Bergen to construct the scaffold in question out of culled material, evidently defective for the purpose, and appellant, without negligence on his part, had suffered the injuries of which he now complains, a different case altogether would have been presented. But, in the present controversy, the record shows that there was plenty of good material out of which this scaffold could have been built; that the defect in this particular plank was discovered by neither Kiehl nor Van Bergen, because they were looking for knots and not for saw cuts in the planks to be used for the floor of this staging. Though appellant Metzler took no part in the building of this particular scaffold, yet it is significant in this connection, that, according to appellant's testimony, it was customary for carpenters to erect staging for themselves upon which to work as buildings progressed, and that this practice was pursued with reference to the building in question by the carpenters at work thereon.

The case of *Arkerson v. Dennison*, 117 Mass. 407, and other authorities cited by appellant, affirm the general doctrine that, where the master undertakes to construct a scaffold, or have staging built under his direct supervision, he is liable for any defect or insufficiency in the structure which due care on his part would have prevented or made good; or, if the master has or retains

charge of the work himself, he is guilty of negligence if defective appliances are furnished, or the structure is built in an unsafe manner, though he had employed suitable and competent men to do the work.

In the case of *Cadden v. American Steel Barge Company*, 88 Wis. 409, 60 N. W. 800, the plaintiff, Cadden, a riveter, was injured while working on a "whaleback" ship by reason of the improper and dangerous manner in which the scaffold had been suspended and adjusted for the employee to work upon. The scaffold had been supplied and adjusted by men employed by defendant specially for that purpose. The court decided that the scaffold builders were not fellow-servants with plaintiff, and that the barge company was liable in damages to plaintiff for injuries sustained. See further, *Sims v. American Steel Barge Co.*, 56 Minn. 68, 57 N. W. 322.

The following authorities affirm the proposition of law, that where the master retains no supervision over the erection of the staging, and gives no directions in regard to it, but provides suitable materials therefor, and intrusts the duty of its construction to skillful workmen, he is not liable to one of the workmen for injuries resulting from the falling of the staging, though insufficiently built. *Ross v. Walker*, 139 Pa. St. 42, 21 Atl. 157; *Burns v. Sennett*, 99 Cal. 363, 33 Pac. 916; *Kelley v. Norcross*, 121 Mass. 508; *Colton v. Richards*, 123 Mass. 484; *Killea v. Faxon*, 125 Mass. 485; *McCone v. Gallagher*, 44 N. Y. Supp. 697.

In these cases last cited, an important distinction is made as to the doctrine of "common employment," involving the liability and nonliability of master to the servant in given instances. The court in *Fraser v. Red River Lumber Co.*, 45 Minn. 237, 47 N. W. 785, enunciates this distinction in forcible language:

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"An important consideration, often overlooked, is whether the structure, appliance, or instrumentality is one which has been furnished for the work in which the servants are to be engaged, or whether the furnishing and preparation of it is itself part of the work which they are employed to perform. If it be the latter, then, as is well settled by our decisions, the master is not liable. It is also well settled that the application of this proposition is not limited to cases where the servants are engaged in the same department of the common service."

In the case at bar, the respondent through his foreman, Thomas, furnished suitable and adequate materials and competent coservants. He did not undertake to furnish the scaffolding, on which appellant stood when injured, in an adjusted condition. It was usual and customary for the employees, including appellant, while at work on this structure, to construct and adjust staging out of the materials provided by respondent. It is illogical to compare such temporary staging with some machine which is all adjusted, so that its sufficiency can be ascertained before the employee is called upon to use it. We think that the action at bar falls within the rule announced in the above authorities, that, where competent men are employed to do some work on a structure upon which scaffolding, or some other appliance to support the workmen, is required—"the employer to furnish the materials, and the employed to construct or adjust the scaffolding or other appliance—the employer is not liable to one of the employees for the careless act of another employee done in the construction, adjustment, or maintenance of the structure or appliance." McFarland, J., in *Burns v. Sennett*, *supra*.

Therefore the conclusion is reached that the judgment of the superior court is right, and must be affirmed.

[No. 4872. Decided April 4, 1904.]

34 480
37 505BENJAMIN FRANKLIN, *Respondent*, v. AUGUST ENGEL,
Appellant.¹

NEGLIGENCE—DANGEROUS PREMISES—TRAP DOOR—NOTICE—EVIDENCE OF WARNING GIVEN TO OTHERS. In an action for personal injuries caused by falling through a trap door, maintained by the proprietor of a restaurant in dangerous proximity to the place provided for customers' hats and coats, evidence that on a previous occasion defendant had warned another customer about approaching the hole is admissible as descriptive of the place and to show defendant's actual knowledge of the danger.

EVIDENCE—DIAGRAM OF PREMISES. In an action for negligence in the maintenance of dangerous premises, a plat which is a substantially correct diagram of the situation is admissible to illustrate the testimony of the witness.

NEGLIGENCE—COMPARATIVE—INSTRUCTION ENDORSING DOCTRINE OF. An instruction that the plaintiff in order to recover need not be wholly free from negligence provided his negligence is slight in comparison with gross negligence of the defendant, is erroneous as an endorsement of the doctrine of comparative negligence.

Appeal from a judgment of the superior court for Columbia county, C. F. Miller, J., entered June 5, 1903, upon the verdict of a jury rendered in favor of the plaintiff for \$500 damages for personal injuries sustained in a fall through a trap door on defendant's premises. Reversed.

Miller & Fouts and *R. F. & R. M. Sturdevant*, for appellant.

M. M. Goodman and *Hardy E. Hamm*, for respondent.

DUNBAR, J.—The appellant was the owner of a brick building in Dayton, Washington, in the front of which he was conducting a general merchandise store, and in

¹Reported in 76 Pac. 84.

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Opinion Per DUNBAR, J.

the rear thereof—separated from the main store room by a partition—he was conducting a restaurant. There was a doorway through this partition, leading from the store room into the room used as a restaurant; and, in the corner of the store room, on the left of one entering the restaurant, was a small room which was used in connection with the restaurant as a private booth, and on the sides of which, next to the store room, were placed coat or hat hooks for the use of patrons of the restaurant. On either side of the store room were counters, and, between them, a space twelve feet wide, running the full length of the store room, used by customers to the store and restaurant. The counter on the left hand side of the store room, being on the left of one going from the street entrance toward the restaurant, extended to a point within six or seven feet of the wall of the small room before mentioned; and, between the end of this counter and room or booth, was a cellar door, three feet ten inches wide by four feet long, used in closing the passage way leading to a cellar underneath the building; which door, when closed, formed a portion of the floor, and when raised, the side or edge of the door was back against the outer wall of said small room, and when open, left said opening through the floor into the cellar. There was no railing or guard or other obstruction of any kind around or about this cellar door or opening.

The complaint alleges that on the 22d day of March, 1902, respondent entered said store room and started for the restaurant in the rear of the building, approaching the hat hooks which were on the wall of the small room facing the store room and over the said cellar door (which was open) for the purpose of hanging thereon his hat and coat, and fell through the cellar door and received the

injury complained of, the ordinary allegations of negligence being set out in the complaint.

The answer denied negligence on the part of the appellant, and alleged due care and diligence in guarding the cellar door and opening into the cellar, mentioned in plaintiff's complaint; and that said opening was duly protected at the time of the injury complained of by boxes, piled about said opening, between said opening into the cellar and the hall leading to the restaurant; and that the respondent's fall was caused by respondent's going out of said hallway, and behind said boxes, while intoxicated with liquor, and by his own carelessness and negligence. The reply was a simple denial of the affirmative allegations of the answer. Verdict was returned by the jury in favor of the respondent for \$500, judgment was issued thereon, and appeal prosecuted.

It is first contended that the court erred in overruling the objection of the appellant to the testimony of witness Spallinger, who testified that the trap door had been open many times before, to the knowledge of the appellant, and that he and others had been warned by the appellant to look out for the trap door, asserting that it was a little dark back there. Considerable testimony of this character was admitted, but finally, upon motion of the appellant's attorney, the testimony was all stricken excepting that portion which related to the warning given the witness, the court saying:

"The court does not think it is competent for the witness to testify about times prior thereto. The jury are instructed not to consider that part of the evidence. But that part of the testimony that the defendant warned the witness to look out for the hole when he approached the rear end of the store will remain in the testimony. It goes to show that the defendant had notice."

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This testimony we think was properly admitted, under the rule announced by this court in *Elster v. Seattle*, 18 Wash. 304, 51 Pac. 394, where it was held that, in an action against the city for injuries received by reason of a fall resulting from the defective condition of a sidewalk, evidence of injuries received by others at the same place, and prior to the accident was permissible on the ground of being descriptive of the condition of the walk, and also as tending to show constructive notice to the city of its dangerous character. Of course, in this case the testimony went further than that, and showed actual knowledge of the appellant.

We are unable to see any objection to the admission of the plat prepared by witness Harper. He testified that it was a substantially correct diagram of the situation, and that it was approximately correct with regard to the situation of the doorway to the cellar door and the counter. It was properly used to illustrate the testimony of the witness, and this seems the only purpose for which it was used, both appellant and respondent using it in the examination of the witness.

Objection is made to a great many of the instructions given by the court, but, with one exception, we think—without specially analyzing the instructions objected to—that they gave the law correctly, and were pertinent to the issues made by the pleadings and the testimony adduced at the trial. The exception noted is as follows:

“While a person is bound to only use reasonable care to avoid an injury, yet he is not held to the highest degree of care and prudence of which the human mind is capable, and to authorize a recovery for an injury he need not be wholly free from negligence, provided his negligence is but slight and the other party is guilty of gross negligence in comparison therewith.”

It is insisted by the appellant that this instruction endorses the doctrine of comparative negligence—a doctrine which is almost universally condemned by courts and authors of the law of negligence. It is a doctrine which was, for many years, sustained by the supreme court of the state of Illinois, but was finally overruled in that jurisdiction in the case of *City of Lanark v. Dougherty*, 153 Ill. 163, 38 N. E. 892, where it was said:

“Objections are made to three of the instructions given for the plaintiff. It is said of two of these instructions, that they ignore the rule of comparative negligence. The doctrine of comparative negligence is no longer the law of this court. The instructions in the present case require the jury to find, that the plaintiff was exercising ordinary care, and that the defendant was guilty of such negligence as produced the injury. This was sufficient, without calling the attention of the jury to any nice distinctions between different degrees of care or of negligence.”

It is contended by the respondent that this instruction does not authorize the jury to enter into the investigation of the question of comparative negligence. But it seems to us, from a careful reading of the instruction, that the jury was warranted, under its terms, in weighing the negligence of the plaintiff and that of the defendant; and that, if they found that—even though the plaintiff had been guilty of negligence—if that negligence was slight in comparison with the negligence of the defendant, the plaintiff could recover notwithstanding such negligence. This, as we understand it, is the doctrine of comparative negligence, and the court especially instituted the comparison between the negligence of the plaintiff and that of the defendant. We think the court confused the doctrine of comparative negligence with the definitions sometimes given of gross negligence, ordinary

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Syllabus.

negligence, and slight negligence. But this classification is not intended to institute a comparison between the negligence of plaintiffs and defendants in actions for damages for injuries claimed to have been sustained, but, as is said by Cooley on Torts, (2d ed.), p. 753:

" . . . the classification only indicates this: that under the special circumstances great care and caution were required, or only ordinary care, or only slight care. If the care demanded was not exercised the case is one of negligence, and a legal liability is made out when the failure is shown."

It would create confusion in the administration of justice if distinctions and comparisons of this kind were submitted to the discretion of jurors, and it is a safer rule to prescribe that, if the injury is caused by the negligence of the defendant alone, recovery can be obtained; but if the negligence of the plaintiff contributes to the injury, such negligence bars a recovery.

For this error the judgment is reversed and the cause remanded with instructions to grant a new trial.

FULLERTON, C. J., and MOUNT, HADLEY, and ANDERS, JJ., concur.

[No. 4981. Decided April 4, 1904.]

THE STATE OF WASHINGTON, *Respondent*, v. CHARLES CLARK, *Appellant*.¹

JURORS—EXAMINATION AS TO GENERAL QUALIFICATIONS—WAIVER BY FAILING TO CHALLENGE. In a criminal prosecution it is not error to require the attorney for the state to examine the jurors as to their general qualifications, since the statute providing therefor is simply declaratory of the rights of the parties, and either side may waive the qualifications, and cannot take advantage of

¹Reported in 76 Pac. 98.

any disqualification unless the juror is challenged for the specific cause, and exception taken.

CRIMINAL LAW—HOMICIDE—INSTRUCTIONS AS TO DEGREES OF OFFENSE—REPETITION. It is not error to repeat instructions defining murder in the first and second degree, as tending to intensify the crime as murder, where the repetition consisted in giving several instructions requested by the defendant which more fully pointed out the distinction between the different degrees.

SAME—INSANITY AS DEFENSE—BURDEN OF PROOF UPON DEFENDANT—INSTRUCTIONS AS TO REASONABLE DOUBT. In a prosecution for murder, where the defense is insanity, the burden is upon the defendant to establish the defense by a preponderance of the evidence, and hence it is proper to refuse to instruct the jury that they may acquit if they entertain a reasonable doubt as to the sanity of the defendant.

SAME—INSTRUCTIONS AS A WHOLE SUBMITTING DEFENSE OF INSANITY. It is not error to instruct the jury to convict if they find beyond a reasonable doubt that defendant committed the crime as charged in the information, in that it eliminated the defense of insanity, where other instructions fully and fairly instructed the jury upon such defense, since all the instructions must be read together.

TRIAL—INSTRUCTIONS—GENERAL CHARGE. It is not error to refuse requested instructions which are covered in the general charge.

HOMICIDE—EVIDENCE—SUFFICIENCY. The evidence is sufficient to warrant a conviction of murder in the first degree where the circumstances were such that there is no possible doubt that the defendant did the killing, although no one saw it, and the motive of jealousy is shown, and where there is no evidence of insanity (defendant's only defense), except his own statements to the effect that he did not know what he was doing, and the statements of two or three witnesses that he "looked wild" and as though he was "going to get on a drunk."

Appeal from a judgment of the superior court for Thurston county, Linn, J., entered June 12, 1903, upon a trial and conviction of the crime of murder in the first degree. Affirmed.

Israel & Mackay, for appellant.

Frank C. Owings, for respondent.

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Opinion Per MOUNT, J.

MOUNT, J.—Appellant was convicted of the crime of murder in the first degree, and sentenced to death. From this judgment he appeals.

The facts are briefly as follows: On January 20, 1903, the appellant, Charles Clark, and Leila Page were living together in a house of prostitution in the city of Olympia. Leila Page was the mistress of the house. They had been so living for about a year. On the date named appellant and Leila Page, at about 4:30 o'clock in the morning, retired to their bedroom. They had both been drinking and she was sick. During the day and night of the 19th of January, they had been quarreling on account of the intimacy existing between Leila Page and one Nate Kirkendall. Appellant had threatened her life. Soon after they retired to their room, Leila Page requested Cleo Reynolds, an inmate of the house occupying the next room, to order a lunch for her. The lunch was ordered over the telephone to be brought from a near-by restaurant to the room occupied by appellant and Leila Page. When the waiter brought the lunch on a tray, Leila Page was lying on the bed with her face from the door and with all her clothes on, apparently asleep, breathing heavily. Appellant was standing in the middle of the room with his coat, vest, and hat off. He took the tray and placed it on the floor and said to the waiter that he had no money. He called to Cleo Reynolds, and asked her to pay for the luncheon. The waiter thereupon left the room, and the door was bolted after him from within. Cleo Reynolds paid for the luncheon, and the waiter went away. Cleo Reynolds went back to her room and soon fell asleep. She heard nothing more until about 8:30 o'clock in the morning, when she was awakened by the appellant calling her in a muffled voice.

She thereupon got up and went to the door of the room occupied by the appellant and Leila Page, but the door was fastened and she could not get in. She could hear appellant speaking her name. She thereupon asked him to open the door. After a short time appellant succeeded in unbolting the door, which was opened, and appellant fell across the open doorway, striking his head against the door jamb. His hands and face and clothes were covered with blood. He was apparently unconscious. He was dressed as above stated. Leila Page was lying on the bed, dead. All her clothes were on, as above described. Her forehead had been crushed, as with the back of an ax, and a long gash was cut across her throat from about the center of the neck to the right ear. Appellant had several cuts in his neck and throat and on his head. His mouth was burnt as if with carbolic acid. There was no evidence in the room of any struggle. An ax, a small pen-knife covered with blood, and a small bottle containing carbolic acid were found in the room. A carving knife was also found under the cover of a settee. Before appellant was taken from the scene he was told by a policeman that he was going to die, and was asked who did the killing. He at first said he did not know. Upon being asked if he was sure, "said he thought Nate did it." Appellant was thereupon taken to a hospital, and soon recovered from the effects of his wounds. In June, 1903, he was put upon trial under an information charging him with murder in the first degree. His defense was insanity. His version of the affair is as follows, quoting from the record:

"Q. Now, I will direct your attention to the night before she died—Sunday night, and I will ask you to start from that point and detail everything that you did, as you remember it, in connection with Leila Page, or

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regarding her, and everything that was done that night, and the next day, describing your conditions and feelings during that time. Just tell the jury all about it. A. Well, Sunday night I went down to the house about midnight and she was not there. The girls said she was over to the 'Star.' Q. What did you do? A. I went to bed and went to sleep, and she came in some time in the morning, I think, along about three or four o'clock. I do not know just what time. She said something—I don't know what she said. And then she put on her clothes and went out, and I don't know where she was going or where she went. Then I went back to sleep. The next morning I got up about noon. She was not in bed, and I looked in the other rooms and she was not there, and I asked Cleo if she had seen her and she said, no. I went down to the wine closet and got a drink of brandy and went to eating my breakfast and went up town. I went to Frank Dickerson's saloon—I was working there, and I asked Frank if he had seen her and he said he had not. The night before I asked him—I opened up the games we were working at and went to work. I thought I would wait until evening, but I could not wait. I felt pretty nervous and went out to the bar and got a drink of brandy. Then I thought that Nate roomed at the Union block and she might be up there. I asked the butcher if he had seen her that morning and he said that he had, that she had been there and went on up toward Swantown. I walked over as far as the Union block and then I walked up and down in front of the Union block a few times. I thought I must be mistaken and went back to the house. I went back to the house and they said she had been there and gone out again. I went back. I don't know how many times I made the trip. It seemed like a dream. I couldn't get any information. I finally went to the Union block, but I don't remember going to the Union block twice. I remember going to Mrs. Hubbard's and finally Mr. Wentz came in with the tray in the room where she was, Cecil Knight's room, and she was lying there on the bed: and I tried to rouse her and told her to get up, and I had her by the shoulder and she hit my

hand and my finger nail scratched her neck; I don't remember what was done or what was said either, but we went home together. She told me she had been at the Union block the night before with Nate Kirkendall. I asked her if she intended to leave me and she said she didn't. Then we embraced and I kissed her several times and I went down stairs and she went down stairs and left the house. She went over to the 'Star,'—I guess it is the 'Wigwam' now. And I went over and asked if she was there and they said she was not. I went back to the house again and telephoned over after a little while and they said she was not there. I sent Cleo out to look for her and she came back and said she was over there and wanted me to come over for her. I was not drunk then and hadn't been drinking any time during the day. I have been drunk and I know what the feeling is. I don't say that the statements made by the witnesses is not so, aren't true and didn't happen. If they did happen I have no recollection of it. We went upstairs to go to bed. She told Cleo to order some lunch I remember that quite well. I went into the room, I didn't know where she was at that time, and I started to undress myself. I don't remember the boy bringing the tray in or who let him in—I don't remember anything of that. Then again I was lying in the hall, and then again I was being carried out, and then again some one poking something down my throat, and then again I came to and found myself lying in a strange bed just like a person would wake up out of a dream."

This is the substance of the evidence on the part of the defense. Other facts necessary to an understanding of the points presented will be stated hereafter. Appellant insists, first, that the court erred in not requiring the attorney for the state to examine the jurors as to their general qualification. It appears that the individual jurors were examined first by the prosecutor for actual and implied bias, and passed for cause; that thereupon they were examined by counsel for appellant. After the state had

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exercised all its peremptory challenges, and the appellant all of his peremptory challenges but one, and had waived that one, appellant objected to the whole panel upon the ground that the prosecutor had not examined the jurors as to their general qualification. This objection was overruled by the court. Counsel argues that, because the statute provides that no person is competent to act as a juror unless he is, (1) an elector of the state; (2) a male inhabitant of the county for the year next preceeding the time he is called; (3) over twenty-one years of age; (4) in possession of all his faculties and of sound mind; (5) able to read and write the English language; and (6) has never been convicted of a felony (§ 5939 Pierce's Code); and because it is provided that, "the jurors having been examined as to their qualification, first by the plaintiff and then by the defendant, and passed for cause, . . . " (§ 601, Pierce's Code), it is therefore the duty of the prosecutor to examine the jurors as to their general qualifications. While it is true that persons, not possessed of the qualifications named in § 5939, *supra*, are incompetent under the statute, it does not follow that the prosecutor may not waive his right to examine the jurors, and also waive the disqualifications named. The statute relating to the examination is simply declaratory of the rights of the plaintiff and of the defendant. Either may waive his right to qualify or disqualify the jurors. That this is true is manifest because of the provision of the next section, which is as follows:

" . . . but no act of a grand or petit jury shall be invalid by reason of such person or persons aforesaid, qualified in other respects, serving thereon; nor shall any disqualification of any member of a grand or petit jury affect the indictment or verdict, unless the juror for that specific cause was challenged or excepted to before the

finding of the indictment or rendition of the verdict, and the challenge or exception overruled, and error specifically assigned, . . . " § 5940, Pierce's Code.

In this case the appellant was not denied the right to examine the jurors as to their general qualifications. He had the opportunity, and failed or refused to exercise it. He simply insisted that the prosecutor should make the examination. It does not appear here that any of the jurors were in fact incompetent or disqualified under the statute. But, even if it did so appear, appellant, under the provisions of § 5940, *supra*, could not take advantage of that fact unless the juror was challenged for the specific cause, the challenge overruled, and an exception taken. It was, therefore, not error for the court to deny the appellant's request.

Appellant next insists that the court erred in repeating the instructions defining murder in the first and second degrees, because by so doing the court intensified the crime as being murder. We think no such result could be inferred. Both plaintiff and defendant prepared instructions in the case, and requested the court to give the same. After reading those prepared by the prosecution, which fairly covered the case, the court gave several instructions requested by the defendant, among which were two paragraphs defining murder in the first and second degrees, which clearly and more fully pointed out the distinction between those two degrees of murder than the definitions already given. While it would not have been error to have refused these instructions, they were given by the court, no doubt, for the purpose of pointing out to the jury more clearly the distinction between these two degrees of murder, so that the jury might not be confused therein. This was manifestly the object of the court, and we are clearly of the opinion that the

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jury could not have been led to believe therefrom that the court intended to, or did, convey to the minds of the jurors his idea of the case. There was, therefore, no error in this.

Appellant next insists that the court erred in refusing to give to the jury the following instruction:

"It is not necessary in order to sustain the plea of insanity that the fact of insanity be established by a preponderance of the evidence; but if, upon the whole evidence, the jury entertain a reasonable doubt as to sanity they must acquit;"

and in giving an instruction upon the question as follows:

"You are instructed that every man is presumed to be sane and to intend the natural and usual consequences of his own acts. As the law presumes a man to be sane until the contrary is shown, I charge you that the burden of proving insanity as a defense to a crime is upon the defendant to establish by a preponderance of the evidence, and unless insanity is established by a fair preponderance of the evidence the presumption of sanity must prevail."

This raises the principal question in the case and the one upon which the appellant apparently relies. Able counsel upon both sides have exhaustively treated the subject in their briefs, and brought to our attention adjudicated cases from nearly all of the states of the Union, and from the supreme court of the United States. The rule contended for by the appellant is sustained by the supreme court of the United States, and by the highest courts of the following states: Florida, Illinois, Indiana, Kansas, Michigan, Mississippi, Nebraska, New Hampshire, New York, Tennessee, Vermont and Wisconsin—in the latest cases cited, as follows: *Davis v. United States*, 160 U. S. 469, 16 Sup. Ct. 353, 40 L. Ed. 499; *Armstrong v. State*, 30 Fla. 170, 11 South. 618, 17 L. R. A. 484; *Jamison v. People*, 145 Ill. 357, 34 N. E. 486;

Plake v. State, 121 Ind. 433, 23 N. E. 273, 16 Am. St. 408; *State v. Nixon*, 32 Kan. 205, 4 Pac. 159; *People v. Finley*, 38 Mich. 482; *Ford v. State*, 73 Miss. 734, 19 South. 665, 35 L. R. A. 117; *Furst v. State*, 31 Neb. 403, 47 N. W. 1116; *State v. Jones*, 50 N. H. 369, 9 Am. Rep. 242; *Moett v. People*, 85 N. Y. 373; *King v. State*, 91 Tenn. 617, 20 S. W. 169; *Revoir v. State*, 82 Wis. 295, 52 N. W. 84; while the highest courts of the following states maintain the rule that, where insanity is set up as a defense in a criminal case, it must be established by a preponderance of the evidence: Alabama, Arkansas, California, Connecticut, Delaware, Georgia, Idaho, Iowa, Kentucky, Maine, Massachusetts, Minnesota, Missouri, Nevada, New Mexico, New Jersey, Ohio, Pennsylvania, South Carolina, Texas, Utah, Virginia and West Virginia—in the cases cited as follows: *Parsons v. State*, 81 Ala. 577, 2 South. 854, 60 Am. Rep. 193; *McKenzie v. State*, 26 Ark. 334; *People v. Hettick*, 126 Cal. 425, 58 Pac. 918; *State v. Hoyt*, 46 Conn. 330; *State v. Cole*, 2 Pennewill (Del.), 344, 45 Atl. 391; *Ryder v. State*, 100 Ga. 528, 28 S. E. 246, 38 L. R. A. 721, 62 Am. St. 334; *State v. Larkins*, 5 Idaho 200, 47 Pac. 945; *State v. Trout*, 74 Iowa 545, 38 N. W. 405, 7 Am. St. 499; *Moore v. Commonwealth*, 92 Ky. 630, 18 S. W. 833; *State v. Parks*, 93 Me. 208, 44 Atl. 899; *Commonwealth v. Eddy*, 7 Gray 583; *State v. Grear*, 29 Minn. 221, 13 N. W. 140; *State v. Bell*, 136 Mo. 120, 67 S. W. 823; *State v. Lewis*, 20 Nev. 333, 22 Pac. 241; *Graves v. State*, 45 N. J. L. 347, 46 Am. Rep. 778; *Kelch v. State*, 55 Ohio St. 146, 45 N. E. 6, 39 L. R. A. 737, 60 Am. St. 680; *Commonwealth v. Woodley*, 166 Pa. St. 463, 31 Atl. 202, *State v. Alexander*, 30 S. C. 74, 8 S. E. 440, 14 Am. St. 879; *Carlisle v. State* (Tex. Crim.

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App.), 56 S. W. 365; *People v. Dillon*, 8 Utah 92, 30 Pac. 150; *Dejarnette v. Commonwealth*, 75 Va. 867; *State v. Welch*, 36 W. Va. 690, 15 S. E. 419. The rule in England is followed by the last named class of states. In the states of Oregon and Louisiana the defendant is required by statute to prove insanity beyond a reasonable doubt. The question presented here was before the supreme court of the territory in *McAllister v. Territory*, 1 Wash. Ter. 360. The court there said:

"The rule of law as to the burden of proof in criminal cases we all agree is this: The burden is on the territory to make out every material allegation in the indictment beyond all reasonable doubt. The learned judge who tried the case in the district court repeatedly, in the instructions given on his own motion, and in those asked on the part of the defendant, told the jury that such was the rule of law. The force and effect of this rule cannot be destroyed by any action of the prosecuting officer so far as the facts constituting the *res gestae* are concerned. Part of the facts included in the *res gestae* may be developed by the territory, and part by the defense, but still the rule is the same. The defendant is entitled to the instruction that the jury must be satisfied of his guilt beyond all reasonable doubt on all the facts so put in evidence, and so the jury were told, except as shown above. And we are satisfied that so far as the facts attending the killing are concerned—at least so far as these facts are included in the *res gestae*, that the burden of proof never shifts. This is as true of the defense of insanity under the limitations stated above, as of any other defense. But if insanity is set up as a separate and distinct defense, and its proof does not consist of the facts attending the killing, then the proof must be made out by the defendant, the legal presumption of sanity being sufficient for the indictment in the absence of evidence to the contrary."

This case is claimed by the appellant as an authority in his favor. It is also claimed by the respondent as an authority in favor of the state. The opinion is to the

effect that when the proof of insanity is made as a part of the *res gestae*, the burden of proving insanity is not upon the state; but where the proof does not consist of facts attending the killing, then the burden of proving insanity is upon the defendant. It will be readily seen, therefore, why each side of this controversy claims the case as an authority in its favor. But it is difficult to imagine a case where the slayer is insane and where the proof of insanity is not a part of the *res gestae*, but is independent of the facts attending the killing. The court, however, in that case sustained the conviction upon an instruction substantially as in this case, because it was held that the facts did not warrant any instruction upon the question of insanity, observing:

"The world has had quite enough of that kind of insanity which commences just as the sight of a slayer ranging along the barrel of a pistol, *marks* a vital spot on the body of the victim, and *ends* as soon as the bullet has sped on its fatal mission."

It will be seen, by an examination of the authorities hereinbefore cited, that the cases in the different states are in irreconcilable conflict as to the quantum of proof upon the question of insanity. All, however, concede that the presumption of sanity prevails, and that there must be some evidence to remove this presumption. In the first class of cases, it is held that, where the evidence raises a reasonable doubt as to the sanity of the defendant, he must be acquitted; in the other, that a reasonable doubt is not sufficient, but the defendant must establish insanity by a preponderance of the evidence. In the first class named, the reason for the rule is that the presumption of innocence always attends an accused person, and that the burden of proving all the elements of the offense rests upon the state and never shifts; that, when the defendant's sanity is put

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in issue, the state must prove it beyond a reasonable doubt, because, without a mind capable of crime, there can be no crime committed; and, therefore, if the jury entertain a reasonable doubt as to the sanity of the accused, it follows that they are in doubt as to his guilt.

The reason for the rule adopted in the other class of states is that sanity is the natural condition of man, and therefore every man is presumed sane until the contrary is made to appear; that, when the commission of a crime is admitted or clearly proven, and insanity is alleged as a defense, it, being an independent affirmative defense and opposed to the natural and usual order of things, must be established by a preponderance of the evidence. Another reason given is that the presumption of sanity is necessary for the well-being, safety, and protection of society, and for the administration of justice, and neutralizes the presumption of innocence upon which the rule of reasonable doubt rests, and therefore leaves the accused, when asserting his insanity, to show the fact by a preponderance of the evidence. Another reason for the rule is that it is the only safe rule for society, while it is also just to the accused.

The distinction between the quantum of proof necessary to raise a reasonable doubt, and that necessary to constitute a *fair preponderance* of the evidence, is more fanciful than real. When evidence is sufficient to raise a reasonable doubt, as such doubt is usually defined and understood, it may also be said in a sense to preponderate. The distinction, therefore, while it may be fruitful of philosophical and theoretical discussion, is of little practical value. Insanity, when it exists as a fact, is easily and readily proved. When it does not exist in fact, it is easily feigned and difficult to disprove. For this latter reason it is the usual

defense when there is no other. It is no injustice to a defendant to presume that he is sane, and to require him to prove the unnatural condition of mind, which he alleges as a defense for a crime admitted, and to relieve him from a penalty justly due to men in their natural condition. Notwithstanding the weighty reasons advanced by the learned courts in the class first named, we desire to adopt the rule laid down by the trial court in this case.

Appellant assigns error upon the instruction of the court given as follows:

"If you find beyond a reasonable doubt that the defendant committed the crime as charged in the information, then I charge you that it is your duty to render a verdict of murder in the first degree,"

upon the ground that the instruction eliminated the defense interposed. If this instruction is to be read as standing alone, it would be subject to the criticism offered. But all of the instructions must be read together, and, when so read, it was not error, because the court fully and fairly instructed the jury upon the defenses interposed by the defendant. This instruction simply told the jury that the information charged murder in the first degree, which was correct.

Other instructions requested by the appellant—defining the duty of the jury, reasonable doubt, circumstantial evidence, and the degree of insanity necessary to acquit—were refused by the court. These questions were all fully and correctly covered and explained to the jury by other instructions which were given; for that reason it was not necessary to give the instructions requested, even though they stated correct principles of law. A further discussion of them is not necessary.

Appellant's last assignment is that the court erred in refusing to grant a new trial by reason of the insufficiency

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of the evidence to justify the verdict. We have carefully examined all the evidence in the case, and, while it is true that no one saw the killing or had an opportunity to see it, except the defendant, the circumstances surrounding the killing are so conclusive that there can be no possible doubt that the defendant did it; that he had prepared for it by taking an ax into the room some time before the deed was done; and that, while Leila Page was asleep or in a drunken stupor, he crushed her skull with the ax and then cut her throat; that he then, with the small pen-knife—probably the same one used on her—and a swallow of carbolic acid, attempted to take his own life; and thereupon became unconscious for a time. There is no evidence of insanity except his own statement hereinabove quoted, and except statements of two or three witnesses to the effect that the day before the tragedy the defendant “looked wild,” that he acted “nutty,” and “like he was going to get on a drunk.” The evidence shows that the defendant was jealous of the deceased, but it is not sufficient to create any sort of a doubt of his sanity; and we have no doubt, upon all the evidence, that, both before and at the time of the crime and afterwards, the defendant was as sane as any man can be who will commit so atrocious a crime. The case was fairly tried, and there is no error in the record.

The judgment is therefore affirmed.

FULLERTON, C. J., and HADLEY, ANDERS, and DUNBAR, JJ., concur.

[No. 4979. Decided April 4, 1904.]

BERNARD LAWSON *et al.*, Respondents, v. SEATTLE & RENTON RAILWAY COMPANY, Appellant.¹

TRIAL—VERDICT—WEIGHT OF EVIDENCE. A verdict should not be set aside because against the weight of the evidence, where there is a substantial conflict on material points, especially where the trial judge who heard the witnesses refused to interfere.

CARRIERS—PASSENGER THROWN FROM STREET CAR—CONTINUOUS NEGLIGENCE—INTOXICATION OF PLAINTIFF—INSTRUCTIONS. In an action by a passenger for personal injuries sustained by being thrown from the running board of a street car, in which there was some evidence to show that the plaintiff was intoxicated at the time, it is not error to instruct that if the plaintiff used that degree of care incumbent upon him under the circumstances, then his intoxication would not prevent his recovery, and that the question was not whether he was intoxicated, but whether he exercised ordinary care, where in connection with all the instructions the effect was not that the jury could not consider intoxication as an element in determining the question of due care, but that the latter question was the real one to be determined and not merely the matter of the intoxication.

DAMAGES—INJURIES TO HUSBAND—SERVICES OF WIFE AS NURSE—WHEN CAN NOT BE INCLUDED. In an action by a husband and wife for personal injuries sustained by the husband, it is error to include in the recovery \$50 for the services of the wife as a nurse, where it appears that nothing was expended in that behalf and that the wife attended to her household duties at the same time, and there was no evidence of the value thereof; and a special finding therefor having been included in the verdict, the judgment should be reduced \$50 in amount.

Appeal from a judgment of the superior court for King county, Griffin, J., entered June 15, 1903, upon the verdict of a jury rendered in favor of the plaintiff for \$630 for personal injuries sustained in falling from the running board of a street car. Affirmed, except as to a special finding for \$50.

¹Reported in 76 Pac. 71.

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Peters & Powell, for appellant. Intoxication does not excuse the omission to use the same care required of a sober man under the same circumstances. *Louisville etc. R. Co. v. Johnson*, 92 Ala. 204, 9 South. 269; *Fisher v. W. Va. etc. R. Co.*, 42 West Va. 183, 24 S. E. 570; *Smith v. Norfolk etc. R. Co.*, 114 N. C. 728, 19 S. E. 863, 923; *Strand v. Chicago etc. R. Co.*, 67 Mich. 380, 34 N. W. 712; *Kingston v. Ft. Wayne etc. R. Co.*, 112 Mich. 40, 70 N. W. 315, 74 N. W. 230, 40 L. R. A. 131; *Chicago etc. R. Co. v. Bell*, 17 Ill. 102; *Toledo etc. R. Co. v. Riley*, 47 Ill. 514.

Turner & Weter, for respondents.

HADLEY, J.—Respondents, constituting a community, sued appellant to recover for personal injuries to respondent Bernard Lawson. The complaint alleges, that said respondent took passage upon one of the electric railway cars owned and operated by appellant; that he went aboard the car at the corner of Second avenue and Washington street, in the city of Seattle, for the purpose of riding to his home in Central Seattle; that the car was crowded with passengers, so that he could neither obtain a seat nor stand inside the car; and that he was compelled by reason of said crowded condition to ride, and did ride, upon the running board or side step of the car, without any notice or knowledge that it would be dangerous to ride at that place; that, while so riding and while exercising due care on his part, at a point where the line of road turns from Washington street into Rainier avenue, he was thrown from the car and dragged for some distance; that he was so thrown and dragged wholly because of appellant's carelessness and negligence in permitting him to ride upon said running board, and in running the car around the curve at a high rate of speed, making it sway, spring, and jolt, thereby causing said respondent to slip and lose his footing, and to be thrown and dragged as aforesaid.

The answer denies the material allegations of the complaint, and pleads contributory negligence. A trial was had before the court and a jury, and a verdict was returned in favor of respondents in the sum of \$630. Appellant moved for a new trial, which was denied, and judgment was entered for the amount of the verdict. The defendant has appealed.

It is first assigned that the court erred in not setting aside the verdict, because it is urged that it was against the weight of the evidence. It is true there was decided conflict in the evidence as to material matters, but it was the province of the jury to weigh the testimony, and to determine as to its credibility and value. It is a general rule that the verdict will not ordinarily be set aside on appeal where there is substantial conflict in the testimony, and especially where the trial judge, who heard and saw the witnesses testify, has declined to interfere. *Bucklin v. Miller*, 12 Wash. 152, 40 Pac. 732; *Miller v. Bean*, 13 Wash. 516, 43 Pac. 636; *Reiner v. Crawford*, 23 Wash. 669, 63 Pac. 516, 83 Am. St. 848.

It is next assigned that the court erred in giving the following instruction:

"You are instructed that intoxication on the part of the plaintiff, if you believe that the plaintiff, Mr. Lawson, was intoxicated, is not as a general rule in itself, as a matter of law, such negligence or such evidence of negligence as will bar his recovery in this action. The law refuses to impute negligence as of course to a plaintiff from the bare fact that at the moment of receiving the injury he was intoxicated. Intoxicated persons are not removed from all protection of the law. If the plaintiff used that degree of care incumbent upon him to use, under the circumstances of this case, then his intoxication, if you believe that he was intoxicated, had nothing to do with the accident. I wish to substitute in place of the

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words 'had nothing to do with the accident:' 'would not prevent his recovering.' When contributory negligence is one of the issues, as in this case, the defendant must prove to you or it must appear to you from all the evidence, that the plaintiff did not exercise ordinary care, and that too without reference to his intoxication. The question is not whether or not the plaintiff was drunk, but whether or not he exercised ordinary care. You are instructed that if you find that the plaintiff was intoxicated, and in a place of danger, and that, if you find that the motorman knew those facts, the motorman was bound to run the car more carefully in order to prevent throwing Mr. Lawson off the car, if Mr. Lawson was in a place of danger."

There was testimony to the effect that the injured respondent was intoxicated at the time of the accident, and this is urged as showing contributory negligence. Witnesses in rebuttal denied that he was intoxicated. Appellant, in criticizing the above instruction, contends that it altogether eliminated from the consideration of the jury the question of the respondent's intoxication, or that it suggested that only that degree of care was required of him which one "under the circumstances of this case" would be expected to use—that is to say, that if the jury believed that respondent was sober, in that event he was required to use the same degree of care which would have been required of sober men under the same surroundings; but that, if they believed he was intoxicated, then he was under obligation to use that degree of care only which would have been required of men intoxicated as he was. Appellant cites *Buesching v. St. Louis Gas Light Co.*, 6 Mo. App. 85, as a case in which, it claims, a similar instruction was given. At page 92 of the volume cited, the opinion, after stating that at the instance of the plaintiff the trial court directed the jury that, if the cellar entrance was dangerous to passengers and deceased was in

consequence injured while exercising ordinary care, they should find for the plaintiff, also proceeds as follows:

" . . . and further declared that ordinary care means that degree of care which may reasonably be expected of a person in the situation of deceased at the time of the accident. This definition of ordinary care is given in some text-books. But in view of the evidence in this case it was calculated to mislead. There was some testimony in this case from which the jury might infer that the deceased was not entirely sober at the time of the accident." As far as appears from that opinion, no other definition of ordinary care was given by the court, and it was properly held that the definition given, in view of the testimony, was misleading. In the case at bar we think the court several times, in the course of its instructions, made it clear to the jury that the rule as to ordinary care is that it must be such as an ordinarily reasonable and prudent person would exercise under the same surroundings. It has been often held by this court that the instructions must be read and construed as a whole, and not in detached parts. We think the suggestion of respondents' counsel as to this instruction is pertinent, viz.: that, after having told the jury what is ordinary care, and that such care was required of respondent in the premises, the instruction had the effect to caution the jury against the danger of supposing—in view of the testimony as to intoxication—that their only duty was simply to determine whether respondent was intoxicated or not. Such an impression would have been erroneous, since the real test which they should at all times have kept before their minds was, did respondent act as a reasonable and ordinarily prudent person would have done under similar surroundings and circumstances? The effect of the court's instruction was not to tell the jury that they could not consider intoxica-

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tion, if they found there was such, as an element in determining the existence or absence of ordinary care, but that the latter question was the real one to determine, and not merely the matter of intoxication. The whole instruction criticized, with immaterial exceptions, was given in the same words by a Colorado trial court. The supreme court of that state, in passing upon the instruction, said:

"Counsel says, 'This instruction commences by advising the jury that intoxication in itself, as a matter of law, is not such negligence as will bar his recovery in this action,' and ends by advising the jury that 'it must appear that the plaintiff did not exercise ordinary care, and that, too, without reference to his inebriety. The question is whether or not the plaintiff's conduct came up to the standard of ordinary care, not whether or not the plaintiff was drunk.' It requires considerable ingenuity to find fault with the language cited. It, in effect, properly states the law to be that the questions being tried were the negligence of the defendant and the contributory negligence of the plaintiff; not whether the plaintiff was at the time intoxicated. That drunkenness on the part of plaintiff would not relieve the defendant from liability, if guilty of negligence; and that, drunk or sober, if the plaintiff, by want of ordinary care, contributed to the injury, he must assume such responsibility, regardless of his condition. We cannot well see how it could have been different. If drunk, he was held responsible for his negligence; and, if drunk, it can hardly be contended that it gave the defendant, for that reason, the right to kill or maim him, but, if known, imposed greater care on the defendant." *Denver Tramway Co. v. Reid*, 4 Colo. App. 53, 35 Pac. 269.

It is next assigned that the court erred in not striking from the complaint, and in not withdrawing from the consideration of the jury, respondent Anna M. Lawson's claim of \$300 for services as nurse, for the reason that the averments of the complaint were not sufficient, and that there was no evidence, to justify any recovery for

such services. The jury returned a special finding of \$50 in favor of respondents as to that item, which amount was included in the aggregate sum of the general verdict. Mrs. Lawson, on cross-examination, testified that her husband was confined to his bed something more than one week, and that he was confined to the house for about one month, but that he was able to walk about the house after leaving his bed. She also testified that she waited upon him and attended him as nurse during this time, but that she at the same time attended to her household duties, and performed the services which she ordinarily discharged as a member of the community. There was no evidence that any expense was incurred, or paid out, to procure other help to assist the wife, by reason of her engagement in waiting upon her husband. There was, therefore, no financial loss to the community on account of said services, unless it was entitled to recover the value of these necessarily increased duties of the wife. There was, however, no evidence as to their value, and, even if it were a recoverable item, the jury should not have been left to speculate as to its value. In this particular we think the court erred.

The cause is therefore remanded, with instructions to the trial court to modify the judgment by reducing it in the sum of \$50. But in all other particulars the judgment is affirmed. The appellant is entitled to recover costs on appeal.

FULLETON, C. J., and ANDERS, DUNBAR, and MOUNT, JJ., concur.

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Syllabus.

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[No. 5016. Decided April 4, 1904.]

FRANK A. NOBLE, *Administrator of the Estate of Harriet E. Whitten, Deceased, et al., Respondents, v.*

WILLIAM WHITTEN *et al., Appellants.*¹

APPEAL—DISMISSAL—PENDENCY OF PRIOR APPEAL—ABANDONMENT. Where two appeals are taken and a motion is made to dismiss the second appeal because of the pendency of the first, and on the oral argument counsel state that they have abandoned the first appeal and rely only on the second, the motion will be denied.

APPEAL—PARTIES—SURETIES ON BOND OF DISTRIBUTEES OF ESTATE—NO JUDGMENT AGAINST. Upon an appeal from an order of distribution of an estate in which the distributees were required to give bonds, the sureties on the bonds are not parties to the judgment upon whom notice of appeal must be served, since under the statute, Pierce's Code, § 2678, no judgment can be taken against them, and they are entitled to their day in court.

APPEAL—NOTICE—PARTIES NAMED IN BODY OF NOTICE—GUARDIAN AD LITEM SIGNING NOTICE AS ATTORNEY—SUFFICIENCY. An appeal should not be dismissed because not joined in by certain interested minors, where the body of the notice includes their names as appealing by their guardian *ad litem*, P., although it is signed by P. on behalf of all the parties as "their attorney" only, since he thereby purports to represent all the parties as attorney and it was not essential that he also sign as guardian *ad litem* for part of them.

APPEAL—PARTIES—FAILING TO OBJECT TO ACCOUNT—NOTICE NAMING UNNECESSARY PARTY—FAILURE OF SUCH PARTY TO JOIN IN BOND. An appeal from an order of final distribution of an estate should not be dismissed because one of the persons named in the notice of appeal did not join in the execution of the appeal bond, when it appears that such person did not file any objections to the account and his successors in interest filed objections and duly joined in the appeal; since he was therefore not a necessary party to the appeal.

APPEAL—BONDS—OBJECTION TO SURETY. An objection to an appeal bond that the surety was not qualified must be first raised in the court below.

¹Reported in 76 Pac. 95.

Motions to dismiss an appeal from a judgment of the superior court for King county, Tallman, J., entered October 20, 1903. Denied.

Victor E. Palmer, for appellants.

J. B. Gordon and *William Hickman Moore*, for respondents.

HADLEY, J.—Two appeals have been taken in this cause and respondents have moved to dismiss them both. One ground of the motion to dismiss the last appeal is that a former one was pending when the last one was taken. At the oral argument of the motion, appellants' counsel stated that they have abandoned the first appeal, and rely upon the last one only. The motion to dismiss was not served until after the second notice of appeal was served. Under similar circumstances this court has held that the first appeal is abandoned, and that it shall not prevent the prosecution of the later one when duly taken. *Sligh v. Shelton etc. Co.*, 20 Wash. 16, 54 Pac. 763; *Griffith v. Maxwell*, 20 Wash. 403, 55 Pac. 571; *Spokane Falls v. Browne*, 3 Wash. 84, 27 Pac. 1077.

It is further urged that the motion to dismiss should be granted for the reason that no notice of appeal was served upon the surety upon each of the bonds given by the distributees, on distribution before final settlement. The order of distribution required that bonds should be given in accordance with the provisions of § 2671, Pierce's Code. Such bonds were given, with the United States Fidelity & Guaranty Company as surety upon each. It is contended that the order settling and allowing the administrator's account was, in effect, a judgment against the surety, for the reason that, in an action upon the bonds, the surety would not be heard to question the validity and final effect

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of said order as to every item and thing therein adjudicated. In the recent case of *O'Connor v. Lighthizer*, ante, p. 152, 75 Pac. 643, this court discussed the question of entering judgment against sureties who are not parties to the proceeding in which the judgment is entered, but who may be in some way related to it by reason of having become sureties upon bonds given in connection with the proceeding. It was held that, in the absence of express statutory authority for entering judgment against the sureties, the power to do it does not exist, and that such judgments when entered are void. It was also held that such sureties are not parties upon whom notice of appeal is required, unless the court has actually entered judgment against them. There is no statute which makes the order of the court, in distributing an estate subject to bonds given by distributees, a judgment against the sureties upon such bonds. They are, therefore, entitled to their day in court before judgment can be taken against them. Indeed, such is the specific provision of the statute. § 2678, Pierce's Code. That section provides that, if the repayment by distributees shall be required, a citation shall first issue requiring the party bound to show cause why an order directing payment shall not be made. After a hearing, the court may make the order directing payment, designating the amount and the time within which it shall be paid. The section then concludes with the following provision:

" . . . and if the money be not paid within the time allowed, an action may be maintained by the executor or administrator on the bond."

It therefore seems to us clear that the order in the probate proceedings is not a judgment, or in effect such, but that the surety is given the specific statutory right to be heard

in a regular action to which he shall be a party before he can be finally concluded in the premises.

It is further urged that the appeal should be dismissed because, as alleged, all the parties in interest before the superior court did not join in the appeal, and were not served with notice thereof. It is contended that the record shows that Victor E. Palmer was guardian *ad litem* of Lonson and Emily Whitten, and that, as such guardian, he appeared for said minors at the time of the hearing, and on their behalf filed exceptions to the order of the court approving the administrator's account. The notice of appeal, in the body thereof, includes the names of said minors as appealing by their guardian *ad litem*, Victor E. Palmer, and as joining in the appeal. The notice is, however, signed "Victor E. Palmer, their attorney." Thus the person signing purports to represent, as attorney, all persons named in the notice. It is argued by respondents that, as the notice is not signed by the guardian *ad litem* as such, or by some one purporting to represent him, it follows that the minors were not joined in the appeal. It is not disputed that the individual who signed the notice is the same individual who is also named therein as guardian *ad litem* for the minors. The person who signed and gave the notice named himself in the capacity of guardian *ad litem* as a party to the appeal. The intention to join the minors and the guardian *ad litem* in the appeal is so manifest that we believe this court should not decline to entertain the appeal on so technical a ground. *Carstens v. Gustin*, 18 Wash. 90, 50 Pac. 933, is cited as an authority that this notice is insufficient. That notice, however, was neither signed by the sureties named in its body, nor by any one purporting to represent them. It was simply signed by the attorneys for the plaintiffs, desig-

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nated as such only. In the case at bar, the signer of the notice is simply described as "their attorney;" but he knew what the notice contained, and, knowing it as an individual, he knew it as an attorney and as the guardian *ad litem* named in the notice. We therefore think it should be held that he intended to do just what the paper which he signed said was intended.

It is next urged that the appeal should be dismissed for the reason that one of the persons named in the notice of appeal did not join in the execution of the appeal bond. The record, however, discloses that the person so named in the notice of appeal did not file objections to the administrator's account, but that others, who are joined both in the appeal notice and in the bond, did file objections as the successors in interest of said person. He is therefore not a necessary party to the appeal, and the inclusion of his name in the appeal notice was of no force or effect.

It is also urged that the appeal should be dismissed for the alleged reason that no person or corporation qualified to become surety on said appeal bond has executed the same on behalf of appellants. This objection should have been made in the court below. § 6510, Bal. Code; *De Roberts v. Stiles*, 24 Wash. 611, 64 Pac. 795; *Jenkins v. Jenkins University*, 17 Wash. 160, 49 Pac. 247, 50 Pac. 785; *Cook v. Tibbals*, 12 Wash. 207, 40 Pac. 935. The statute of 1893, cited above, intended that questions as to the sufficiency and qualifications of sureties on appeal bonds should be first raised in the superior court, and to such effect are the decisions cited, as well as others which might be cited.

The motion to dismiss the appeal is denied.

FULLERTON, C. J., and ANDERS, DUNBAR, and MOUNT, JJ., concur.

[No. 4903. Decided April 4, 1904.]

THOMAS CURRANS, *Respondent*, v. SEATTLE & SAN FRANCISCO RAILWAY & NAVIGATION COMPANY,
Appellant.¹

APPEAL—PARTIES—ASSIGNEE OF JUDGMENT—SERVICE OF NOTICE UPON, NOT NECESSARY. The assignee of a judgment is not a party in interest, upon whom notice of appeal must be served, and an appeal will not be dismissed for failure to make such service, but upon request the assignee will be substituted as party respondent.

MASTER AND SERVANT—NEGLIGENCE—COAL MINE IN POSSESSION OF DEVELOPMENT COMPANY—CONTROL BY OWNER. In an action against a coal company for personal injuries sustained by a miner, a challenge to the sufficiency of the evidence, on the theory that the mine was not in the possession of the company at the time of the accident, but in the possession of a construction company, which had been doing development work, is properly overruled, where in addition to the coal company's ownership other circumstances appear connecting it in a responsible way with the control and operation of the mine.

SAME—INJURY TO MINER BY DELAYED BLAST—USE OF DEFECTIVE FUSE—EVIDENCE OF NEGLIGENCE—SUFFICIENCY—QUESTION FOR JURY. In an action for injuries sustained by a delayed blast, it is a question for the jury whether defendant was guilty of negligence in supplying the workmen with double-tape fuse for use in blasting in a coal mine, where it appears that triple tape fuse is firmer, less liable to miss fire or to hold the fire in delay, and is more often used in coal mines and in damp places than the double-tape, which was considered not safe in such places, and where the blast was delayed some forty-five minutes, which was longer than usual.

SAME—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISKS—EXPERIENCED MINER INJURED IN INVESTIGATING DELAYED BLAST. In such a case, the question of the contributory negligence and assumed risk by an experienced miner injured while investigating the cause of a delayed blast is for the jury, where he had been working but a short time in the mine, was unfamiliar with double

¹Reported in 76 Pac. 87.

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tape fuse and did not know that it was unsafe or more likely to hold fire or delay the blast than triple-tape fuse, although he was a miner of twenty-three years' experience, and had heard that fuses held fire for hours, and when it was a rule for an explosion to occur or for the fire to be extinguished before the lapse of time for which he waited for it, and he testifies that in mines where he had worked fuses were not used; since he does not assume an increased hazard out of the ordinary which he did not appreciate, and contributory negligence is a defense, the burden of establishing which is upon the defendant.

Appeal from a judgment of the superior court for King county, Griffin, J., entered April 3, 1903, upon the verdict of a jury for \$25,000, for injuries sustained by a coal miner by a delayed blast. Affirmed.

Root, Palmer & Brown, for appellant.

John Larrabee, W. L. Waters, and Ballinger, Ronald & Battle, for respondent.

HADLEY, J.—This is an action to recover damages for personal injuries received from the explosion of a blast in a coal mine. The suit was brought against the Seattle & San Francisco Railway & Navigation Company and the Green River Construction Company. At the trial a nonsuit without prejudice was granted as to the latter company, but was denied as to the former. The cause was then submitted to a jury, and a verdict was returned against the said Seattle & San Francisco Railway & Navigation Company in the sum of \$25,000. A motion for a new trial was denied, and judgment was entered in accordance with the verdict. The said judgment-defendant has appealed.

Respondent moves to dismiss the appeal for the reason that no notice of appeal was served upon the assignee of the judgment. The judgment was filed April 3, 1903, and

was, on the 10th day of the same month, duly assigned to the Northwestern Improvement Company. The assignment was filed in the clerk's office April 13, 1903, in accordance with § 5133a, Bal. Code, and, under the terms of said section, the record became notice of the assignment from the time of filing. The notice of appeal was not served until June 27, 1903, which was more than two months after the assignment of judgment was recorded. It is therefore contended that, since the assignee of the judgment is the real party in interest, the notice of appeal should have been served upon it. Appellant says it had no actual notice of the assignment, but the declaration of the statute—that the filing of the assignment shall be notice—probably answers that argument. However, we think, under our procedure, that an appellant is not required to serve notice of appeal upon the assignee of the judgment from which he appeals. No specific statutory provision to that effect has been pointed out to us. Section 6503, Bal. Code, provides that notice shall be served upon "the prevailing party or his attorney;" and § 6504 provides that it shall be served "upon all parties who have appeared in the action or proceeding." The assignee of the judgment cannot be said to belong to either class, since he is an entire stranger to the case in every way until after the judgment is entered. The case is finally closed by the judgment, and any interest which the assignee may acquire therein arises from subsequent history. It is therefore unnecessary to serve him with notice of appeal. He is, however, as the successor in interest, a proper party to be substituted as respondent; and, since each party here requests such substitution in the event the motion to dismiss the appeal is denied, it is therefore now ordered that the motion to dismiss the appeal be denied, and that

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said Northwestern Improvement Company be, and it is, hereby substituted as party respondent herein.

Appellant assigns as error that the court denied the challenge to the sufficiency of the evidence, and also denied the motion for judgment. The challenge and motion were interposed at the close of plaintiff's case, and also when all the evidence had been introduced. Involved in this assignment of error is the claim that there is no evidence showing that respondent was in the employ of appellant at the time he was injured. Appellant was the owner of the mine property, but its co-defendant, Green River Construction Company, for a time was engaged in certain development work in and about the mine. It is urged by appellant that the evidence shows that said construction company was in sole charge when respondent was injured. Whatever may be our view as to whether the evidence tends to show that the construction company may have been interested in the operation of the mine at that time, it will be remembered that the court granted a nonsuit as to said company, and that action of the trial court has not been brought here for review in this appeal. The question here is, was appellant a wrongdoer in the premises, and was there sufficient evidence tending to connect appellant with the control and operation of the mine to warrant its submission to the jury. We think there was. We do not deem it necessary to review in detail the testimony upon that subject. It is sufficient to say that, in addition to the fact of ownership by appellant, a number of circumstances, given in evidence, were such that we think it would have been error for the court to have decided, as a matter of law, that appellant was not in a responsible way connected with the control and operation of the mine at the time of the accident. The same may be said in refer-

ence to appellant's further claim that respondent was in the employ of an independent contractor not connected with either of the defendant corporations. Those were questions, under the evidence, to be submitted to the jury for their determination.

The next contention under the above assignment of error is that no negligence on the part of appellant was shown. The evidence shows that respondent and another went into the mine about 7 A. M. They began drilling holes for a couple of blasts, and so continued until near noon, when the holes were ready for the charges. They placed the blasts, each lighted the fuse connecting with his own blast, and then both hurried out of the mine to await the explosions. Four or five minutes after reaching the surface they heard one explosion. They waited and listened for the other, but it did not occur. Meantime they ate lunch, and, after the lapse of about three-fourths of an hour, they returned to the mine to investigate. An investigation disclosed that it was the blast which was placed and lighted by respondent that had failed to explode. Respondent proceeded to the location of the fuse, and was just bending over to examine it when the blast exploded. Respondent's eyes were destroyed, his hands broken, and he was otherwise injured in a permanent way. He charges negligence on the part of appellant in furnishing a fuse which, he alleges, was defective.

The evidence shows that two kinds of fuse are manufactured; one is called "double-tape" fuse, and the other "triple-tape" fuse. One essential difference between the two is that the double-tape fuse lacks one outside wrapper that belongs to the triple-tape. The additional wrapper is a greater protection against moisture, and makes the triple-tape article safer where dampness is encountered.

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Another difference is found in the fact that, with the absence of the additional wrapper on double-tape fuse, it is not as firm as the triple-tape, and in the process of tamping some small piece of rock or coal may be tamped against it, and produce a dent or kink that may break the progress of the fire when it is ignited. Triple-tape fuse contains about fifteen per cent more powder meal than is found in double-tape. This powder meal is placed along the fuse, and through it runs a powder yarn that is steeped in saltpeter. This powder yarn is intended to act as a carrying fuse itself, and to carry the train of fire along in the powder meal, the latter being the powder used in the fuse. In passing through the machine, in the process of manufacture, the continuous train of powder may be broken so that a space may be left where there is no powder, but the powder yarn running through the center is supposed to supply the deficiency, and carry the fire along. If by chance an indenture should break the yarn at such a point, so as to form a disconnection, then the fire might go out entirely in the dampness; but, if the fuse happened to be in a dry place the heat might be sufficient to set the inside lining on fire, and it might continue along until it struck the yarn again. The above indicates some of the points of difference between the two kinds of fuse, and the results that may follow from their use. The fuse furnished to respondent, and which was used by him, was of the double-tape kind.

Before the motion for nonsuit was made, at the close of the plaintiff's case, there was considerable testimony to the effect that the double-tape fuse is not a proper or safe one to use in a coal mine. This view was also much strengthened by the testimony of George B. Adair, a witness afterwards introduced by the appellant. This wit-

ness appears to have had extensive experience in dealing with explosive materials. The testimony shows that he is the most extensive dealer therein for this northwest coast country, and that he sold the fuse that was used in this instance. He testified concerning the nature of the two kinds of fuse substantially as heretofore detailed. He testified that each grade is standard of its kind, and proper to be used for the purposes intended; that the fuse used in this instance was of recent manufacture, and as good an article of that grade as is manufactured anywhere in the world. His testimony was, however, to the effect that the double-tape grade is intended for use in dry places, and not in coal mines, and that from ninety to ninety-five per cent of the fuse which he sells for use in coal mines is of the triple-tape kind.

There was much evidence to the effect that, for the reasons heretofore stated, the use of the triple-tape fuse will much more certainly insure a discharge of the explosive, and also that the discharge will quickly follow the ignition of the fuse; that the fire is more apt to slowly make its way along the trail of the double-tape, and, if it is not extinguished entirely, may finally effect a discharge after much delay, and at an unexpected moment. One witness testified that, with the use of the triple-tape, a failure to discharge will not occur more than once in one hundred times, and that, in such a case, the fire will be extinguished and there will be no discharge at all after considerable delay.

There was also some testimony that appellant's foreman had, prior to this accident, been informed by workmen who complained to him that the kind of fuse used was defective for the purpose, and that he had said that he would investigate the matter, or words to that effect.

Appellant says there was no evidence that the delayed explosion was the result of using defective fuse. It need not be argued that the explosion was due to the fact that fire reached the charge at that moment. Fire had been placed in the fuse connected with the charge some forty-five minutes before. The explosion was therefore delayed and, from the testimony as to the results of the applied use of the different kinds of fuse, it was to be determined whether the delay was due to the fact that this particular fuse was used. With such testimony as is above outlined, we think it would have been error for the court to have decided, as a matter of law, that no negligence was shown. That was a question for the jury. It was for them to say whether negligence was shown, under all the testimony as to the character of the fuse used, as to the kinds manufactured, and as to what is customarily used for coal mining purposes. Such was true at the close of the plaintiff's case, and the testimony relating to that subject was emphasized before the evidence was finally closed.

Another question involved in the challenge to the evidence is, perhaps, the most serious and difficult one in the case. Appellant contends that, under the evidence, the court should have held, as a matter of law, that respondent assumed the risk, and that the cause for that reason should have been taken from the jury and dismissed. It is urged that, although it is the duty of the master to provide a safe place for the servant to work, and to exercise reasonable care to furnish for his use materials which are not defective, yet, if a new danger arises during the progress of the work which is known to the servant and is not known to the master, it at once becomes the duty of the servant to inform the master of such new danger, and it then becomes the latter's duty to investigate and remove

it; that, if the servant fails to so inform the master and voluntarily goes into the presence of the danger, he thereby assumes the risk, and if injured he cannot recover.

The above stated legal proposition is undoubtedly correct, but the difficulty as to its application arises when we undertake to apply it to the facts of the given case. It is urged, that the respondent in the case at bar knew, and that appellant did not know, of the existence of this unexploded blast; that respondent knew that the fuse had been fired, and that the blast was liable to explode; that with such knowledge, he voluntarily went into the presence of the danger, and should be held to have assumed the risk.

Respondent testified that, although a miner of twenty-three years' experience, yet he did not know of the defective character of this fuse. He had been working at this mine but a short time, and was engaged on his eleventh shift when injured. He said he had not been accustomed to the use of either kind of fuse hereinbefore described, but that what he called "squibs" had been used in mines where he had worked. He stated that he did not know of the danger of smouldering fire and delayed discharges from the fuse furnished by appellant. He admitted he had heard miners say that fuses had been known to carry fire for hours, and then cause explosions, but said he had never known such a thing to occur in his experience. Appellant therefore urges that respondent's own admission shows that he had heard of such danger, and also that, as a miner accustomed to the use of explosives, he should have known that danger was probable, and should have guarded against it accordingly.

Notwithstanding any lack of knowledge or experience on respondent's part in the premises, he should doubtless

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be held to the same accountability as other persons in like surroundings assuming to discharge the class of work which he had undertaken. It is well known that the use of explosive materials is hazardous, and those using them must assume the danger that is merely and ordinarily incidental. But when conditions exist which are out of the ordinary, and when, by means thereof, one has been brought into the presence of an increased hazard, and of a danger not usual or ordinarily expected, we think the test as to whether he has assumed the risk must depend upon whether he has acted as an ordinarily prudent person would have done under similar circumstances. Perhaps no two accidents ever happened in exactly the same manner, and under the same circumstances; but the conditions are often very similar. Each case must depend upon its own facts and surroundings, but it is the intention of the law to apply the above stated general rule to the varying circumstances. Whether one has acted with the care of an ordinarily prudent person, under given surroundings, is a question of fact in each case. In a given case, the facts tending to show want of ordinary care may be such as to leave no room, in the minds of reasonable men, for difference of opinion. In such a case, the court should determine, as a matter of law, that recovery cannot be had. But in all other cases the fact becomes one for the jury to determine, and it is therefore ordinarily for the jury.

"It is well settled that where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law but of fact and to be settled by a jury, and this whether the uncertainty arises from a conflict in the testimony or because the facts being undisputed fair-minded men will honestly draw different

conclusions from them." *Richmond etc. Co. v. Powers*, 149 U. S. 43, 45, 13 Sup. Ct. 748, 37 L. Ed. 642.

See, also, *Washington etc. Co. v. McDade*, 135 U. S. 554, 10 Sup. Ct. 1044, 34 L. Ed. 235.

If respondent assumed the risk, then he was guilty of negligence which contributed to his injury, the latter being included in the former. In this state contributory negligence is an affirmative defense, and the burden is upon the defendant to establish it. *Spurrier v. Front St. Cable R. Co.*, 3 Wash. 659, 29 Pac. 346. It is, therefore, in rare cases only that the subject of contributory negligence should be withdrawn from the jury. *McQuil-lan v. Seattle*, 10 Wash. 464, 38 Pac. 1119, 45 Am. St. 799. See, also, collection of Washington cases, under the title of the last named case, in Remington's Notes on Wash. Rep. p. 218.

We therefore think the questions of contributory negligence and assumed risk were for the jury in this case. Evidence was before the jury as to the nature of the fuse used, as to the probability, from experience, of quick or delayed explosions, and as to the probable extinguishment of the fire after the lapse of time. It appeared from the evidence that it is the rule for an explosion to occur, or for the fire to be extinguished, before the lapse of as long a time as forty-five minutes. It is the exceptional condition when one or the other of these things does not occur within that space of time. It was therefore for the jury to say whether, under all the circumstances and under common experience in the use of fuse and blasts, as shown by the evidence, the respondent waited as long as an ordinarily prudent person under like surroundings would have done before going back into the mine. If he exercised that degree of care, then we think he cannot be

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said to have assumed the risk. He had the right to assume that the danger was passed after the lapse of such time as common experience, under similar circumstances, had taught was sufficient to remove the causes for danger.

Appellant seems to have proceeded at the trial upon the theory that the question of assumption of the risk in the case was purely one for the court. No instruction was therefore asked or given, directly calling the jury's attention to this feature of a reasonable or sufficient lapse of time between the firing of the fuse and the return to the mine, as a fact upon which they should pass. Such an instruction, if requested, would doubtless have been given. We think, however, that the question was submitted to the jury by general instructions given, and that they must have passed upon that feature of the case. The court instructed that the degree of care which one is required to use, in order that he shall not be guilty of contributory negligence, is that same degree of care which the ordinarily careful and prudent person exercises under like circumstances to protect himself from danger. The jury were also instructed that, if one is injured by reason of certain negligence on the part of his employer, but, if he himself has been guilty of some act or omission which has contributed proximately and directly to the cause of his injury, he cannot recover. These instructions comprehended the feature of contributory negligence in returning to the mine too soon, and the jury must have passed upon that question in favor of respondent.

For all the foregoing reasons, we think, the court did not err in denying both the challenge to the evidence, and the motion for judgment, either at the time when first made, or when renewed at the close of the evidence. Other errors are assigned upon the introduction of testimony,

and also concerning two instructions. We think the court correctly instructed the jury, and we do not find that prejudicial error was committed in connection with the introduction of testimony. We deem it unnecessary to prolong the discussion by taking up those matters in detail. The verdict in this case is large, but no complaint is made in this court that it is excessive. We shall therefore not consider that matter.

The judgment is affirmed.

DUNBAR and MOUNT, JJ., concur.

[No. 4225. Decided April 4, 1904.]

FLORENCE JOHNSTON *et al.*, Respondents, v. EDSON GERRY, Appellant.¹

APPEAL—STATEMENT OF FACTS—PROOF OF FILING. Where the statement of facts is bound separately from the transcript, the endorsement on the former of the date of filing over the signature of the clerk of the lower court ought to be sufficient proof that it was so filed, since by Laws 1901, p. 28, § 2, the statement is a part of the record.

SAME—SUPPLEMENTAL RECORD TO SHOW FILING AND NOTICE OF SETTLEMENT. A motion, made in the brief before the transcript is filed, to strike the statement of facts for failure to duly show that it was filed in time or that notice of settlement was served, should be denied where the next day a supplemental transcript is prepared and sent up showing due filing, notice and proof of due service; and such motion does not preclude additions to the record since there was at the time nothing in the appellate court upon which it could operate, and Laws 1901, p. 28, authorizes such additions.

SAME—SERVICE OF NOTICE OF SETTLEMENT—PROOF BY THE CERTIFICATE. A recitation in the trial judge's certificate of an appearance and consent at the time of certifying a statement of facts is persuasive argument against granting a motion to

¹Reported in 76 Pac. 258, 77 Pac. 503.

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strike the statement for failure of the record to show notice of settlement and proof of service.

APPEAL—BRIEFS—ASSIGNMENT OF ERRORS. While errors not pointed out with reasonable clearness will not be considered, a brief will not be struck out for failure to assign the errors where alleged errors are set forth with the pages of the record showing the various rulings, and rule eight is substantially complied with.

EJECTMENT—PARTIES—NONRESIDENTS NOT CONSENTING TO ACTION. In an action of ejectment commenced by part of the heirs interested in recovering the land, the other heirs, who are nonresidents and whose consent to bringing the action could not be procured, are proper but not necessary parties defendant in order that they might, if they saw fit, have their rights determined.

PROCESS—PUBLICATION OF SUMMONS WITHIN NINETY DAYS. Where part of the defendants are not residents, and personal service of the summons and complaint is made upon a resident defendant, it is not essential that the service upon the nonresidents by publication be commenced within ninety days from the filing of the complaint, if there is no unreasonable delay.

ACTIONS—DILIGENCE IN PROSECUTION OF ACTION—PROCESS—DELAY IN SERVICE. A delay of four months in commencing service by publication, after a personal service upon a resident defendant, is not unreasonable or ground for dismissal for lack of diligence in the prosecution of the action, where the delay was caused in part by a second publication made necessary by an error in the first and insisted upon by the defendant personally served and moving the dismissal.

SAME—SECURITY FOR COSTS—DELAY. An action will not be dismissed for delay on the part of one of the nonresident plaintiffs in filing security for costs, where the security was in fact given, since there was no prejudice thereby.

EJECTMENT—LEGAL TITLE—WHEN NOT ESSENTIAL. Under Bal. Code, § 5500, changing the common law rule, ejectment may be maintained against a party in possession holding the legal title, where the plaintiffs have an equitable title or interest in, and right to the possession of, the property.

EJECTMENT—ACTIONS—DISMISSAL—CONSPIRACY—VOLUNTARY DISMISSAL AS TO PART OF THE WRONGDOERS—WHEN NOT AN ESTOPPEL. In an action to recover possession of premises obtained through a fraudulent conspiracy, the voluntary dismissal as to part of the conspirators does not operate as an es-

toppel against the further prosecution of the action against the defendant in possession, since the same will be regarded as an election not to sue the parties dismissed rather than a release of the right of action, as the defendants could have been sued separately, and the gist of the action is the wrong done in procuring title, the averment of conspiracy being immaterial.

PLEADINGS—MOTION TO MAKE DEFINITE—ERROR CURED BY TESTIMONY. The overruling of a motion to make more definite and certain becomes unimportant in view of testimony subsequently introduced covering the points in question.

INFANCY—DISAFFIRMANCE OF DEED—DELAY OF THREE YEARS. Where a minor does nothing for more than three years after attaining his majority to disaffirm a deed executed by him when he was nineteen, he fails to disaffirm the contract within a reasonable time, as required by Bal. Code, § 4581, and can not claim that the deed is invalid because not ratified by him.

PRINCIPAL AND AGENT—AGENT'S SECURITY FOR ADVANCES—EJECTMENT—FRAUD OF AGENT IN TAKING TITLE—FINDINGS—SUFFICIENCY OF EVIDENCE—JUDGMENT ON PROOFS ORDERED BY SUPREME COURT. Where the heirs of a homestead applicant employ one G to procure title through the instrumentality of an act of Congress, after a rejection of the claim by the secretary of the interior, under an agreement to pay him reasonable compensation and his disbursements, and G spent considerable time, and the jury find that he expended \$1,350 in that behalf without success, and some years later G and others procured title by means of a suit against the state brought by one M. who conveyed to G, and it appears that G secured deeds from two of the heirs covering a two-fifths interest, entered into possession and mortgaged the lands, in an action of ejectment brought by four-fifths of the heirs, the gist of which is the fraud of G in procuring title in himself after entering upon the aforesaid employment, in which action G testifies that he is willing to surrender three-fifths upon payment of three-fifths of his disbursements while employed, a finding and judgment that G was the owner of but a one-fifth interest, and allowing him no lien for his disbursements is not justified by the proofs or in accordance with justice, and the supreme court will order judgment to the effect that G is the owner of two-fifths subject to the mortgage, and that he have a lien upon the other three-fifths for three-fifths of his disbursements; since an agent purchasing property for his principal has a right to

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hold it as security for money advanced with the principal's consent.

SAME. In such case, the entire property would be subject to the mortgage, G's two-fifths interest to be first exhausted.

SAME—INTEREST. Where the appellant is entitled to interest only from the time the amount due is determined, the supreme court upon reversing the lower court and determining the amount due, should allow interest thereon only from the date of the final judgment in the supreme court, and not from the date of the judgment appealed from.

SAME—APPEAL—COSTS. Held not inequitable under the circumstances of the case, to allow no costs on appeal to either party.

Appeal from a judgment of the superior court for Whatcom county, Neterer, J., entered February 3, 1903, upon the verdict of a jury rendered in favor of the plaintiffs, in an action to quiet title and recover possession of real property. Reversed.

Elmon Scott, for appellant.

Fairchild & Bruce, for respondents.

ANDERS, J.—This action was instituted by the heirs at law of David Dealy and Martha Dealy, both deceased, to recover possession of the N. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$, and lots 3 and 4, of sec. 16, Tp. 38 north, of range 2 east, (W. M.), situate in Whatcom county, Washington.

The respondents move the court to strike from the files the statement of facts herein, for the reasons, (1) that it does not appear that said statement was filed in the office of the clerk of the superior court within thirty days after the rendition of the judgment appealed from, or within any further time given by the court, or by stipulation of the parties, or at any time, or at all; (2) that it does not appear from the record that any notice was ever given to the respondents of the filing of said state-

ment of facts; and (3) that Ida J. Moore, one of the parties who appeared in the cause, was never served with any notice of the filing or settlement of the statement of facts.

As to this motion, it may be observed generally, that the learned counsel for the respondents do not really claim that the said statement was not, in fact, filed with the clerk of the superior court within the time provided by law, or that, as a matter of fact, no notice of such filing was served on respondents. It is frankly conceded, that the "purported" statement of facts shows that it was filed in the office of the clerk; that it has a waiver of notice by some of the parties, a stipulation that it contains all the facts, and the affidavit of appellant's counsel that it was served, with notice of its filing, on one of the respondents' counsel. But it is insisted that the notice of the filing of the statement of facts, and the proof of the service of such notice, cannot be considered by this court, because they were not embodied in the transcript of the record and files, as prepared and certified by the clerk.

It is the duty of the clerk of the superior court, under the statute, to prepare, certify, and file in his office, within ninety days after an appeal has been taken, a transcript containing a copy of so much of the record and files as the appellant shall deem material to the review of the matters embraced within the appeal, said transcript to be so prepared, certified, and filed in the office of the clerk, at or before the time when the appellant shall serve and file his opening brief. The statute also provides that, within four months after an appeal has been taken, the clerk shall, at the expense of appellant (except in certain specified criminal cases), send up to the supreme court such transcript, together with the original briefs on appeal filed in his office, and that the papers and copies so sent up, to-

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gether with any thereafter sent up, as provided therein, shall constitute the record on appeal. But it is evident that the legislature did not intend that the "papers and copies" sent up by the clerk, at the instance of the appellant, should, in all cases, be considered as constituting the *whole* record on appeal; for they further declared that "any bill of exceptions or statement of facts on file when the record is so sent up shall be sent up *as a part thereof*, unless the superior court, or a judge thereof, has not yet passed on an application for the settling and certifying of such bill or statement." Laws 1901, p. 28, § 2, amending § 6513, Bal. Code.

It is, therefore, plain that a statement of facts or bill of exceptions, certified by the trial court, or a judge thereof, in accordance with the requirements of the statute, after proper notice to the necessary parties, constitutes a part of the record in the appellate court. Indeed, the sole purpose and effect of such certification is to make the bill of exceptions or statement of facts a part of the record. Bal. Code, § 5060. In this case, it appears that the clerk of the superior court caused the statement of facts to be bound in a separate volume from the transcript, and that some papers were attached to the former that properly should have been included in the latter, among which were the notices, and proof of service of the same, which the respondents claim can only be shown by the transcript as certified by the clerk. The statement of facts is indorsed as filed by the clerk on March 1, 1902; and, inasmuch as the signature of the clerk is not disputed, it would seem that such indorsement ought to be considered sufficient proof that it was so filed. But, be that as it may, it appears from a supplemental certificate of the clerk, attached to the transcript and dated May 27, 1902,

that the filing of the statement of facts was noted by him on March 1, 1902, in the regular appearance docket kept by him in his office. Judgment was entered in this action on February 3, 1902, and the statement, according to the indorsement upon it and the certificate of the clerk above mentioned, was filed on the 1st day of March following, and therefore within the time limited by law.

It also appears from the supplemental transcript, certified and sent up by the clerk with the original transcript, at the request of appellant, that proper proof was made of the service of a copy of the proposed statement of facts on respondents' counsel, and of the admission of service of notice of the filing and settling of the same by the defendant, Ida J. Moore. The respondents' brief appears to have been filed in the office of the clerk of the superior court on May 26, 1902, and the respondents incorporated therein the motion, now under consideration, to strike the statement of facts. On the following day, May 27, the supplemental transcript hereinbefore mentioned was prepared and certified by the clerk.

It is urged, however, by counsel for the respondent, that this court cannot properly consider any additions to, or corrections of, the record which were made after the filing and service of their motion. But we are of the opinion that this contention is not tenable. The motion to strike the statement of facts is, of course, addressed to this court, and, at the time it was made in respondents' brief, both the statement and transcript were still in the superior court. It follows, therefore, that there was then nothing here upon which the motion could operate. And, conceding (though not deciding) that, on filing the record and briefs with the clerk of this court, the motion became operative, by relation, as of the time it was filed in the

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superior court, still it does not necessarily follow that it must be granted. Before the time had expired within which the clerk was required by law to transmit the record to this court, the appellant caused the transcript, as originally made and certified by the clerk, to be supplemented, as we have already intimated, so as to show the filing of the statement of facts and the service thereof on the respondents, as well as the proof of due service of the notices above mentioned. This he had the right to do, and thus make the record speak the truth, notwithstanding the motion interposed by the respondents. Indeed, the same thing might have been done, under the statute, even after the record was transmitted to this court. The language of the statute relating to this subject is, in part, as follows:

"In case any bill of exceptions or statement of facts shall be filed or certified, or any other addition to the records or files shall be made after the record on appeal shall have been sent up, a supplementary record on appeal, embracing so much thereof as the appellant deems material, or a copy thereof, may be prepared, certified and sent up at any time prior to the hearing of the appeal." Laws 1901, *supra*.

It appears from the certificate of the trial judge, attached to the statement of facts, that, at the time of the signing and certifying of the statement, the plaintiffs and respondents appeared by their attorneys, and consented to the certifying and signing of the same; and that fact itself constitutes a persuasive argument against the granting of the motion in question. The motion to strike the statement of facts is denied.

The respondents also move this court to strike the brief of appellant, and affirm the judgment herein, "because the said brief does not assign any errors upon which any ruling of the trial court might be called in review, or brought in

question before this court." It is provided in § 6514. Bal. Code, and also, in effect, in rule 8 of this court, that the appellant's brief shall clearly point out each error relied on for a reversal; and it is alleged by counsel for the respondent that the appellant herein has failed to comply with the law in that regard, and they cite *Haugh v. Tacoma*, 12 Wash. 386, 41 Pac. 173, 43 Pac. 37, and *Perkins v. Mitchell*, 15 Wash. 470, 46 Pac. 1039, in support of their position. In those cases the briefs were stricken for the reason that they did not point out any error whatever relied on for a reversal, or allege that any error was committed by the trial court, or that any of the matters discussed in the briefs were ever presented to such court for determination. But in this case a different state of facts is presented. Alleged errors of the trial court are set forth in appellant's brief, and the pages of the record showing the various rulings of the court, and the objections thereto, are designated therein. Errors not pointed out with reasonable clearness will not be considered by this court, but where the law has been substantially complied with, a motion to strike the brief will not be granted. *Chandler v. Cushing-Young Shingle Co.*, 13 Wash. 89, 42 Pac. 548. The motion to strike appellant's brief is also denied.

It appears that the land in controversy in this action was settled upon by one David Dealy (together with his wife and certain of his children) in the year 1884, for the purpose of acquiring title thereto under the homestead laws of the United States. Thereafter he offered to file his homestead application for the land in the proper land office. His application was rejected for the reason that the land therein described had been reserved and set apart for the benefit of common schools. On appeal, this decision of the officers of the local land office was sustained, both by the

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commissioner of the general land office and the secretary of the interior. No appeal was taken to the courts, and the finding in effect that the land belonged to the state was considered conclusive as to its ownership. The state, however, by its proper officers, disclaimed all interest in the land, and selected and obtained other land in lieu of it. It thus appeared that neither the general government nor the state claimed it, and no individual had obtained title.

Such being the peculiar status of the land, a bill was introduced in Congress permitting the said David Dealy to file his homestead application in the district land office at Seattle. This bill, it seems, never became a law. But it appears that in 1894 Congress did pass an act for the relief of the heirs of Martha A. Dealy, widow of said David Dealy, who died in the year 1892. For some reason, not clearly disclosed, nothing was done by the heirs of Martha A. Dealy to acquire title to the land under the act of Congress. Subsequently an act was passed by the state legislature for the relief of such heirs, which was vetoed by the governor. Thereafter no legislative relief was sought or obtained by any of the heirs of David or Martha A. Dealy.

After the efforts of the Dealy heirs to obtain title to the land in question had thus failed, one John Munro instituted in the superior court of Thurston county an action against the state of Washington, in which it was adjudged and decreed that the state held the legal title to the land hereinbefore described, from the United States government, and that said state held such title in trust for the plaintiff, John Munro, and that the state, by its proper officer (designated by the court), make and execute a deed of conveyance of the above described land to the plaintiff, John Munro, within ninety days, provided the defendant did not appeal

from said judgment to the supreme court. This judgment was entered on September 15, 1899. No appeal was taken therefrom, and a deed was thereafter executed to Munro in accordance with the terms of the decree. Subsequently Munro conveyed portions of the land so deeded to him to various persons, who are designated as defendants in the complaint herein, and another portion thereof to the defendant and appellant, Edson Gerry. Before the commencement of this action, the land conveyed by Munro to Gerry was, by the latter, mortgaged to Ida J. Moore, one of the defendants, to secure the payment of an indebtedness to her.

The complaint herein seems to have been filed in the superior court on July 2, 1900. It alleges, that the plaintiffs are the surviving heirs at law of David Dealy, deceased, and Martha Dealy, his third wife, deceased; that the defendant Thomas Dealy is the only surviving heir at law of the said David Dealy, deceased, and his first wife, deceased; that the defendants William Dealy, Beckie Johnson, and Susie Davis, are the surviving heirs at law of said David Dealy, deceased, and ——— Dealy, his second wife, deceased; that the defendants York are the surviving heirs at law of James York and Mary York, deceased, the latter having been a daughter of said David Dealy, deceased, and his second wife, deceased; that, in the spring of the year 1884, the said David Dealy and Martha Dealy, his wife, together with their family, made a settlement upon, and began to improve the N. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ and lots 3 and 4 of sec. 16, Tp. 38 North, R. 38 East, in Whatcom county, Washington; that, at the time of making their said settlement upon said land, the same was subject to settlement and entry, and the said David Dealy and Martha Dealy and their family made improvements upon said

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lands of great value (stating it), and continued to reside thereon until on or about May 8, 1892, when the said David Dealy died; that said Martha Dealy, widow of said David Dealy, deceased, continued to reside with her family upon said land until July 15, 1893, when she died; that, immediately after the death of said David Dealy, said Martha Dealy was appointed administratrix of his estate, and continued to act as such administratrix until the time of her death; that on or about November 6, 1893, one John Broyles was appointed administrator of the estate of David Dealy, deceased; that he, as such administrator, took possession of the lands above described, and the improvements thereon, and continued in the actual, open, and peaceable possession thereof until February 26, 1900, at which time he was discharged by the court, and the administration of the estate closed; that during the year 1889 the said David Dealy employed the defendant Edson Gerry to act as his agent and attorney, and to take such steps as to him should seem best to procure title to said lands for the said David Dealy and Martha Dealy; that, while the defendant Edson Gerry was acting as such agent, the said David Dealy died, and the said Edson Gerry continued to act for said Martha Dealy, for herself and as administratrix of the estate of David Dealy, deceased; that after the death of said Martha Dealy, the said defendant Gerry continued to act as agent and attorney for the plaintiffs and for said estate, and that on August 2, 1893, the plaintiffs and their brother, David Dealy, now deceased, executed and delivered to the defendant, Edson Gerry, a power of attorney, wherein and whereby they constituted and appointed him their attorney in fact for the purpose of securing for them title to said lands, and the said Gerry then and there undertook to act as such attorney in fact for the purpose aforesaid, which said power

of attorney is of record in Whatcom county and has never been recalled or revoked by any of the parties, and the same is now in full force and effect; that, while the said Edson Gerry was acting as such agent and attorney, he received money from said David Dealy during his lifetime, and after his death from said Martha Dealy, and after her decease from the plaintiffs and from the estate of David Dealy and Martha Dealy, deceased; that the defendant Gerry, while professing to act as the agent of the plaintiffs, entered into a conspiracy with the defendant John Munro, whereby he caused title to said land to be procured in the name of said John Munro for the purpose of defrauding the plaintiffs, and, during the time he was procuring the said title, he was representing to the plaintiffs that he was still acting as their agent and endeavoring to secure for them the title to said lands; that, immediately upon procuring title to said land, the defendant John Munro, in furtherance of said conspiracy, executed a deed to the said defendant Gerry, conveying to him a large portion of said lands, and conveyed to defendants Hurlbut, Nicholson, Hayne, and Ida J. Moore, other portions of said lands, and that said defendants claim to be in possession of said property, and to own the same; that the said defendants Hurlbut, Nicholson, Hayne, and Moore had full knowledge of the claim, interest, and rights of the plaintiffs, and of the fraud to be practiced upon them by said John Munro and Edson Gerry, at the time of the execution of the conveyances so made to them as aforesaid, and that the said conveyances were so executed to, and received by, said parties with the intent to defraud the plaintiffs; that the plaintiffs and the defendants Thomas Dealy, William Dealy, Beckie Johnson, James York, William York, Edward York, and Susie Davis are the only

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heirs at law of the said David Dealy, deceased; that, after the discharge of John Broyles as administrator of said estate, the said defendants took possession of said property and have ever since retained possession thereof. The complaint further alleges, that plaintiffs had made a demand on the defendants for the possession of the property, and that the said defendants now hold the same adversely to the rights of the plaintiffs; that the defendants Thomas Dealy, William Dealy, Beckie Johnson, Susie Davis, James York, William York, and Edward York are nonresidents of the state of Washington, and their consent to the bringing of this action could not be procured, and for that reason they are made parties defendant; that, since the entry into the possession of said property, as aforesaid, the rents, issues, and profits thereof have been of the reasonable worth and value of \$200, and said sum has been paid to the defendants, or some of them, as rent for the said property. The prayer of the complaint is, (1) for judgment against all the defendants, except the Dealy heirs, for the possession of said property; (2) for costs and disbursements; (3) for a writ of restitution; and (4) for the sum of \$200, the rents and profits of said land.

Before the contesting defendants filed their answer, the plaintiffs, by leave of court, voluntarily dismissed the action as to Munro and his above mentioned grantees, save and except defendant Edson Gerry, and as to all the lands described in the complaint except that portion thereof conveyed by Munro to said Gerry. The complaint, as above set forth, was not amended, either before or after the entry of the order of dismissal above mentioned. The defendant Gerry was personally served with the summons on July 3, 1900, the day following the filing of the complaint. The defendants alleged to be heirs of David Dealy, de-

ceased, were served by publication, but such publication was not commenced until November 3, 1900. At this stage of the case the defendants Gerry and Moore, conceiving and insisting that the plaintiffs' cause of action, if any they had, was purely equitable, and could not be enforced in an action at law, moved to strike the complaint, on the grounds, (1) that it failed to state facts sufficient to entitle the plaintiffs to proceed at law; (2) that it purports to state a cause of action at law; and (3) that ejectment will not lie against the holders of the legal title. This motion was denied by the court and the ruling excepted to.

The said defendants then moved that the complaint be made more definite and certain, so as to set up, among other things, (1) the terms of contract or contracts whereby said Edson Gerry agreed to act as agent and attorney, the time or times when the same were made, whether written or oral, what recompense he was to receive, and whether the plaintiffs have paid the same; (2) what moneys have been paid or tendered by plaintiffs to said Gerry, and at what time; and (3) whether or not the said lands were administered upon, distributed, or disposed of, and to whom, in the administration proceedings pleaded. This motion was also denied, and exception noted by the court.

A motion to require a nonresident plaintiff to give security for costs was granted. Several motions to dismiss for want of prosecution were made and denied. After these motions had been denied, the defendants Gerry and Moore demurred to the complaint on the grounds, that there was a defect of parties plaintiff and defendant; that it did not state facts sufficient to constitute an action at law; and, generally, that it did not state facts sufficient to constitute a cause of action. This demurrer was overruled and an exception noted.

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Thereafter the defendant Gerry, answering, denied that the plaintiffs and certain defendants named as heirs in the complaint are the only heirs at law of Daivd Dealy, deceased, and alleged that David Dealy, Jr., now deceased, was one of such heirs, having as great a right as any of the others; denied any knowledge or information sufficient to form a belief as to whether certain defendants named in the complaint are the heirs at law of David Dealy, deceased, and his first and second wives, or as to whether the defendants York are the surviving heirs at law of Mary York, deceased; denied that he entered into a conspiracy with John Munro, or with any one, to defraud the plaintiffs, or that he procured or took title to the lands in the name of John Munro to defraud the plaintiffs, or that he acted as agent for said David Dealy or Martha Dealy, or said administrator, after the year 1893; denied that he received any moneys from them thereafter, and alleged that the only money he ever received from David Dealy and Martha Dealy, or either of them, was \$320 given to him for special disbursements, which he disbursed accordingly; denied that he ever received from the plaintiffs any money, except \$5 paid in July, 1893, and alleged that he thereafter, from time to time, demanded money from them to meet expenses, which greatly exceeded the sums so received, to prosecute said business in accordance with their agreement, and that they refused to pay the same. The answer contains other denials which it is not necessary to set forth specifically at this time.

The defendant Gerry admits, in his answer, that in the year 1888 he entered into a contract with said David Dealy, whereby he was to act as his agent and endeavor to procure title to the said premises, and whereby the said David Dealy was to pay all his expenses incurred therein, repay him all

his disbursements, and pay him a reasonable compensation for his services; but alleges that the said David Dealy failed and refused to comply with the terms of said contract on his part, and repudiated the same, and abandoned all his claims thereunder. The defendant also admitted that he acted as agent for said Martha Dealy and certain of the heirs, and had a power of attorney from the plaintiffs Florence Johnston, Elsie Beidler, and Belle Castle, and from David Dealy, Jr.; but alleges that, in the latter part of the year 1893, and at all times thereafter, the plaintiffs, and each of them, repudiated and refused to be bound by their agreement, in any way, or at all, and relinquished all rights thereunder, and refused to furnish the necessary moneys for the expenses and disbursements incident to such agency, and for the payment of the defendant.

The defendant further pleaded in his answer several affirmative defenses, among which were, an estoppel by reason of the release of John Munro and others, designated in the complaint as defendants, and open, notorious, adverse possession of the premises in question, by the defendant and his grantor, for a period of more than ten years prior to the commencement of this action. He also set up a counter claim for the money expended by him in the matter of his agency, and for his compensation in that behalf. He also alleged, that on December 30, 1899, he executed certain notes to the defendant Moore, and secured the same by a mortgage on the premises conveyed to him by the said John Munro; that the said defendant Moore had no knowledge or notice from him, or otherwise to his knowledge, of the existence of any claim or claims or right by, or upon the part of, the plaintiffs, or other heirs-defendant, or any of them, in or to the premises described in the complaint, or any part thereof; and that the said

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mortgage is a valid and subsisting lien on said lands, paramount to any and all claims of the plaintiffs, and of the defendants, other than the said Moore. And, as a partial defense to the action, the defendant Gerry averred that, on May 2, 1895, George Dealy, one of the plaintiffs, and David Dealy, Jr., one of the heirs of David Dealy, for a valuable consideration, conveyed by deed whatever rights they, and each of them, had in and to the said lands, whereby, if the plaintiffs have any rights therein, this defendant became the owner of an undivided two-fifths of said lands, and that said deeds are of record in the auditor's office of Whatcom county, in volume 40 of Deeds, pages 121-123. The prayer of the answer is, that the action be dismissed; that the said mortgage be adjudged a first and valid lien upon said premises, as against all of the plaintiffs and defendants, in the event that the plaintiffs, or any of them, be held to have any rights in and to said premises; that the expenses and disbursements of this defendant, together with a reasonable compensation for his services, with interest on each, be adjudged a first lien thereon, and that the plaintiffs and the heirs defendant be compelled to pay the same, as a condition precedent to their obtaining any relief herein. The new matter contained in the answer was controverted by the reply, and, upon the issues so formed, the cause was tried to a jury.

However, before the case came on for trial, a default judgment was entered in favor of the defendants Gerry and Moore, and against the defendants who were served by publication (except Beckie Johnson, who was permitted to come in as a party plaintiff), wherein and whereby it was adjudged and decreed that said defendants Thomas Dealy, William Dealy, James York, William York, Edward York, and Susie Davis, and all persons claiming, or

to claim, under them or either of them, take nothing in this action, as against the said defendants Edson Gerry and Ida J. Moore, and that they are forever estopped from asserting, as against them, their successors, or assigns, any interest in or to the premises described in the pleadings in this action, and every part thereof. A default was also entered in favor of the plaintiffs, and against these same defendants. No appeal was taken from the above mentioned interlocutory judgment in favor of the defendants Gerry and Moore.

Upon the trial the jury, under the direction of the court, made special findings, some of which do not seem to be entirely consistent with others, and one, at least, of which does not appear to be supported by any evidence disclosed by the record. With their special findings, the jury returned a general verdict, by which they found that the plaintiffs were the owners, and entitled to the possession, of an undivided four-fifths of the property therein described (the same being the premises described in the deed of Munro to defendant Gerry), and that the defendant Edson Gerry was the owner, and entitled to the possession, of an undivided one-fifth interest in and to said property, and that the mortgage of the defendant Ida J. Moore was a valid and subsisting mortgage upon an undivided one-fifth interest in and to the said premises. The defendant Gerry thereupon moved the court, (1) for judgment in his favor dismissing the action, on the grounds that it appears from the complaint and pleadings of plaintiffs, the evidence, and the findings of the jury, that the rights and claims of the plaintiffs, if any they had, were founded upon an alleged conspiracy between defendants Gerry and Munro to defraud the plaintiffs, and, with full knowledge thereof, the plaintiffs, after the commencement of this action, released

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and discharged the said Munro from all liability therein, and caused this action to be dismissed as to him, and thereby lost the right to seek any relief in this action, or to further prosecute the same; (2) that the plaintiffs be not permitted, in any event, to recover more than the aggregate of their individual interests, or one-tenth each, as shown by the pleadings and proofs in the cause; (3) that the mortgage to Ida J. Moore be adjudged to be a lien upon all the lands described in the verdict herein, if said verdict is allowed to stand for any purpose; and (4) that the plaintiffs be required to repay to the defendant Gerry the amount of his expenditures in and about procuring the title to said lands, viz.: the sum of \$1,350, as found by the verdict of the jury, before they are allowed to recover anything in this action, and that the same be declared to be a lien upon the whole of said lands. This motion was by the court denied.

The said defendant then moved for a new trial for the following reasons: Error in the assessment of the amount of recovery in favor of said defendant; insufficiency of the evidence to justify the verdict, and that said verdict is against the law; error in law occurring at the trial, and excepted to at the time. The court denied the motion for a new trial, and entered judgment in accordance with the verdict of the jury, declaring the plaintiffs (and Beckie Johnson) to be the owners and entitled to the possession of four-fifths of the property in controversy, and the defendant Edson Gerry to be the owner and entitled to the possession of one-fifth thereof. The court further adjudged that the mortgage of Ida J. Moore was a valid lien upon the lands, but ordered that such lien shall not be enforced against the interests of the plaintiffs therein until after the interest of Edson Gerry has been exhausted. The court also dis-

missed the action as to the said defendant Moore, at the cost of the plaintiff, and gave judgment against the defendant Gerry and in favor of plaintiffs for their costs and disbursements. From this judgment, the defendant Gerry has appealed to this court, and has specified various errors alleged to have been committed by the court below during the progress of the cause, on which he relies for a reversal.

It is first claimed that the trial court erred in denying appellant's motions to dismiss the action for want of prosecution, which were made at different stages of the case. And it is urged that these motions should have been granted for the reasons, (1) that the publication of the summons was not commenced within ninety days after the filing of the complaint; (2) that the nonresident plaintiff failed to give security for costs within a reasonable time after the court had ordered such security to be given; and (3) that the action was not prosecuted with reasonable diligence. Our statute relating to the manner of commencing actions provides that,

"Civil actions in the several superior courts of this state shall be commenced by the service of a summons, . . . or by filing a complaint with the county clerk, as clerk of the court: Provided, that unless service has been had on the defendant prior to the filing of the complaint, the plaintiff shall cause one or more of the defendants to be served personally, or commence service by publication within ninety days from the date of filing the complaint." Bal. Code, §4869.

As we have seen, the publication of the summons was not commenced within ninety days after the date of filing the complaint, and it is, therefore, insisted by counsel that, under the statute, appellant was entitled to a dismissal of the action; and *Deming Investment Co. v. Ely*, 21 Wash. 102, 57 Pac. 353, is cited in support of his position. In that case this court said:

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"In other words, a valid service of summons by publication cannot be had unless commencement by publication thereof is begun within ninety days from the date of filing the complaint."

The plaintiffs in that case, it will be observed, were endeavoring to obtain service of the summons on all the defendants by publication, and the court correctly held that such service could not be had after the expiration of the ninety days' limitation fixed by the statute. Here, however, it is admitted that one, at least, of the defendants was served personally, and the question to be determined is whether the rule announced in the case above cited should be applied in the case at bar. It is earnestly contended by counsel for the appellant that the defendants not personally served were all necessary parties to the action, and, under the statute and the said decision of this court, could not be served by publication after the time designated by law. And counsel for the respondents seem to concede that necessary parties must be served personally, or that service by publication must be commenced within the statutory time, but they insist that the defendants not personally served were not necessary parties, and that they were made parties defendant in order that they might, if they saw fit, set up, and have determined, any apparent rights which they might claim in or to the property in question.

We have concluded, from a consideration of the entire complaint, including the prayer for relief, that the defendants in question were proper, though not necessary, parties. But, be that as it may, we are of the opinion that, in contemplation of the statute, the action was timely commenced by personal service of the summons on the appellant, and that the court did not err in refusing to dismiss it for a failure to commence service on the nonresident defendants by publication within ninety days from the time of filing

the complaint. But we do not wish to be understood as deciding that personal service on one or more of the defendants will indefinitely prolong the time for service by publication. Persons who begin actions in court are in duty bound to prosecute them with reasonable diligence; but, in view of the fact that a large part of the delay complained of was caused by a second publication of summons—the first having been defective—and that the appellant insisted on having all the defendants served, we are unable to say that the prosecution of the cause was unreasonably delayed.

As to the point that appellant was entitled to a dismissal for a delay on the part of one of the plaintiffs in giving security for costs, it is sufficient to say that it appears that such security was in fact given, and the appellant was, therefore, not prejudiced by reason of the delay.

It is next contended that the court erred in overruling appellant's demurrer to the complaint, and in support of this contention it is argued that there is a defect of parties defendant, that the complaint fails to state a cause of action at law, and that the rights of the respondents can only be enforced, if at all, in a proper proceeding in equity. We cannot assent to the proposition that there is a defect of parties; and we are not convinced that the complaint fails to state a cause of action under our statute. It is true that, at common law, the plaintiff, to support an action of ejectment, must be vested with the legal title to the lands in question. 10 Am. & Eng. Enc. Law (2d ed.), 482. But this rule has been changed by statute in several of the states, and does not obtain in this state. This action was evidently brought under § 5500, Bal. Code (Pierce's Code, § 1142), which provides that,

"Any person having a valid subsisting interest in real property, and a right to the possession thereof, may recover the same by action in the superior court of the proper

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county, to be brought against the tenant in possession; if there is no such tenant, then against the person claiming the title, or some interest therein, and may have judgment in such an action quieting or removing a cloud from plaintiff's title;"

It will be observed that the appellant was not only in possession of the lands in question, but was claiming title thereto at the time the complaint was filed, and it therefore follows that the action was properly brought against him, under the section of the code above cited. But did the complaint show that the respondents had an interest in the premises sufficient to support the action? We think it did. It appeared from the averments of the complaint, which must be deemed true for the purposes of the demurrer, that the respondents had an equitable title to, or interest in, the property, notwithstanding the fact that the legal title was held by appellant. And we recently held, after a careful consideration of our statutes and the prior decisions of this court, that one having an equitable title to real property may maintain an action for possession thereof, under the above mentioned section of the statute. See *Povah v. Lee*, 29 Wash. 108, 69 Pac. 639. In that case the court, among other things, said:

"One holding an equitable title and being out of possession need not first bring an action to turn his equitable into a legal estate, and then bring a second action to obtain possession. His rights may all be tried in one action, and we think it is the intent of this statute, as well as the general policy of the law, to require him to so try them."

See, also, *Brown v. Calloway*, ante p. 175, 75 Pac. 630.

It is further contended that the court erred in refusing to dismiss the action on the ground that the release, by respondents, of John Munro, who was alleged to have been a joint wrongdoer with appellant, discharged the latter, and estopped the respondents from further prosecuting the

action. It was held in *Turner v. Hitchcock*, 20 Iowa 310, cited by appellant, that, as a general rule, the release of one joint tortfeasor discharges all. But it was also held in that case, which was an action to recover damages for a trespass, that, if several persons jointly commit a tort, the plaintiff in general may elect to sue all, or some of the parties jointly, or any one of them separately. We find no fault with the doctrine announced in that case, but we do not think it supports appellant's contention. It seems to us that the dismissal of the action as to Munro, and other parties originally named as defendants, was, in effect, an election not to sue them, rather than a release of a right of action. It has frequently been held that a civil action for damages, sustained because of a conspiracy, may be brought and sustained against a single defendant. See, 6 Am. & Eng. Enc. Law (2d ed.), p. 872, and cases cited. And we see no reason why this rule should not apply to cases like the present, in which the gist of the action is not the alleged conspiracy, but the wrong done by appellant in procuring title to the lands in controversy in his own name, in disregard of his alleged agreement with the respondents. The averment of a conspiracy in the complaint was immaterial, and might have been omitted altogether without affecting the respondents' cause of action. *Hutchins v. Hutchins*, 7 Hill 104. We think the motion to make the complaint more definite and certain should have been granted, but by reason of the proofs subsequently introduced, that question has become practically unimportant.

We now come to the consideration of the merits of the case as disclosed by the record. An examination of the evidence has convinced us that the verdict and judgment as rendered are neither in accordance with justice, nor justified by the proofs introduced at the trial. It is mani-

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fest that the interest of the respondents in these lands grows out of, and depends upon, their contract with the appellant. They inherited no interest therein from their father by reason of his settlement thereon, for it was determined by the proper officers of the government that he obtained no interest in, or right to, the premises on account of such settlement. Indeed, the decision of the land department of the government induced the making of the original contract between David Dealy and the appellant, as well as the subsequent agreements hereinbefore mentioned.

The respondents Johnston, Beidler, Castle, and their brother David M. Dealy, deceased, in the year 1893, entered into the contract with appellant now under consideration, whereby the appellant undertook to further endeavor to procure for them a title to the entire tract of land described in the complaint herein, and whereby they promised to pay the expenses occasioned by the prosecution of said business, together with a reasonable compensation for his services, and to repay the moneys advanced by him in furtherance of the enterprise. At the time these contracts were entered into, all parties believed that the land desired could only be obtained through the instrumentality of an act of Congress. With that object in view, the appellant went to the city of Washington, and there industriously labored, for a considerable length of time, to accomplish his purpose. While there he not only disbursed the small sums of money sent him, from time to time, by his principals, according to his agreement, but paid a large amount of expenses, attendant upon his employment, out of his own funds, a portion of which was money received from the government as a pension. Although he claimed to have expended a much larger sum, the jury found that he thus paid out \$1,350. It is not pretended that that sum, or any

part of it, has ever been refunded by the respondents, and it would therefore seem clear that appellant should have had the benefit of such finding in some manner in the final judgment, which was denied him by the court.

During the course of the trial it was stipulated by the respective parties that, if the respondents and the appellant should each be found entitled to an interest in the property, then their recovery should be by fifths; or, in other words, if the respondents prevailed, they should recover three-fifths or four-fifths of the premises, and the appellant one-fifth or two-fifths, according to their respective rights as shown by the evidence. It was conceded at the trial by the respondents that appellant was entitled to one-fifth of this land as grantee of David M. Dealy. But appellant contended that he was also entitled to at least an additional fifth, which was conveyed to him by George Dealy, one of the respondents, at the time David M. Dealy's deed was executed.

This deed—as we have said—was executed on the 2d day of May, 1895. At that time George Dealy, the grantor, was between nineteen and twenty years of age. And at the trial he contended that his deed was invalid when made, and was still invalid, because he had not ratified it since he attained his majority. The learned trial court instructed the jury on that theory, and thereby, we think, committed error. Our statute provides, in effect, that a minor who wishes to *disaffirm* his contract must do so within a reasonable time after he becomes of age, and restore to the other party what he received from him by reason thereof. Bal. Code, § 4581. But in this instance the respondent George Dealy did not repudiate or disaffirm his deed, or attempt to do so, until at or about the time this action was commenced, which was more than three years after he attained

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Opinion Per ANDERS, J.

his majority. That was certainly not within a reasonable time, and he must now be deemed bound by his deed.

Upon the trial the appellant was sworn as a witness in his own behalf, and testified, in substance, that he was the owner of an undivided two-fifths of the land in question by purchase from the aforesaid David M. Dealy—designated in appellant's brief as David Dealy, Jr.—and the respondent George Dealy. He also testified, in effect, that he was, and at all times had been, willing to transfer to respondents their proportionate interest, on payment by them of the amount due for his services, and the money paid out by him in accordance with the terms of his agreement. But he further testified to the effect that he had agreed with the respondents, or some of them, that he would himself stand two-fifths of these expenditures, inasmuch as he owned two-fifths of the property, in case they should pay the remaining three-fifths thereof. Giving to the respondents the greatest benefit they can possibly claim by reason of this testimony, they are still indebted to appellant for expenses incurred by him in a sum equal to three-fifths of \$1,350, the amount the jury found he had expended, viz., \$810. And the respondents' interest in the land in litigation should have been made subject to a lien in favor of appellant to secure the payment of such indebtedness. It has been directly held that, where an agent purchases property for his principal, he has a right to hold it as a security for the money advanced by him with the principal's consent. See, *Rose v. Hayden*, 35 Kan. 106, 10 Pac. 554, 57 Am. Rep. 145, and cases cited.

We do not deem it necessary to send the cause back for a new trial, as it appears clear to our minds, from the record before us, that a proper and equitable judgment may be ordered by this court. Since this appeal was argued

and the cause submitted, the appellant has died, and the administrator of his estate has been substituted in his place by order of the court, and the judgment ordered will be entered accordingly.

The judgment of the court below is reversed, and the cause remanded with instructions to enter a judgment and decree adjudging the respondents to be the owners, and entitled to the possession, of an undivided three-fifths of the lands described in the judgment appealed from, said interest, however, to be subject to a charge of \$810 as a lien thereon in favor of appellant, and providing that, if the same, together with legal interest thereon from the date of the decree, be not paid within one year from said date, then said interest may be sold as upon execution to satisfy said lien. The court will, by its decree, award the remaining two-fifths of said premises to the appellant, subject to the mortgage to Ida J. Moore. Neither party will recover costs.

FULLERTON, C. J., and DUNBAR and MOUNT, JJ., concur.

ON PETITION FOR REHEARING.

[Decided July 12, 1904.]

PER CURIAM.—The appellant has filed a petition for a modification of the opinion of this court filed in this cause on April 4, 1904. It will be shown, by an examination of the said opinion, that the superior court adjudged the mortgage executed by appellant to Ida J. Moore to be a valid lien upon all the lands in controversy in this action. But it was further adjudged that the interest of appellant in the land should be primarily subject to the mortgage lien. After the lien of the mortgage had been established by the judgment of the court, the action was dismissed as to the mortgagee, at the instance of the respondents. The

July 1904.] Opinion Per Curiam on Rehearing.

finding of the court that the mortgage was a lien upon the entire land in dispute having been accepted and acquiesced in by the respective parties to the action, we deemed the controversy in that regard at an end, and therefore refrained from discussing the question at length on the appeal.

It was stated, in effect, in the opinion heretofore filed in this cause, that the appellant's two-fifths interest in the land was subject to the mortgage to Ida J. Moore. But it was not stated therein that the remaining three-fifths of the premises, awarded to the respondents, was also subject to the lien of that mortgage; and, for that reason, appellant asks to have the opinion so modified as to express more clearly the real meaning and intention of the court with respect to that matter. We did not suppose that it would be inferred, from anything that was said in the opinion, that it was the intention of the court to modify or reverse the ruling of the superior court fixing the status of the mortgage. As we have already intimated, we did not consider that question an issue in the case, as presented to this court. The superior court awarded only one-fifth of the land to appellant. But this court, after a careful consideration of the evidence, concluded that he was entitled to two-fifths thereof, subject, however, to the mortgage, and therefore directed the trial court to enter a judgment to that effect. And when we stated that appellant's said interest in the property was subject to the mortgage of Ida J. Moore, we supposed it would be understood, although not so stated, that the respondents' interest therein was also subject to the lien imposed upon it by the same instrument, and validated by the judgment of the court above mentioned. But, inasmuch as a doubt has arisen in the minds of counsel as to our decision in regard to that matter, we

will again say that it was not our intention to annul, modify, or change the ruling of the lower court as to the validity of this mortgage, but simply to show that the lien extended to, and was binding upon, the interests of all parties, as finally determined by this court.

The appellant also asks that interest on \$810, which was found to be due him from the respondents, be allowed from the date of the judgment appealed from, instead of from the date of the final judgment, as specified in the opinion of the supreme court. But, inasmuch as we are still of the opinion that appellant is entitled to interest on his demand only from the time when the amount thereof was finally determined, we are not inclined to grant this request. We are also of the opinion that it was not inequitable, under the circumstances appearing in this case, to refuse to allow costs to either party, and appellant's request to recover the costs of the appeal is likewise denied.

[No. 5006. Decided April 4, 1904.]

PETER HOLPPA, *Appellant*, v. CITY COUNCIL OF THE CITY
OF ABERDEEN *et al.*, *Respondents*.¹

APPEAL — DISMISSAL — CESSATION OF CONTROVERSY — EXPIRATION OF LIQUOR LICENSE PRIOR TO HEARING. An appeal from an order dismissing a writ of certiorari to review the action of a city council in revoking a liquor license will be dismissed where, prior to the hearing, the license has expired by lapse of time, since there is no longer any controversy.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered June 15, 1903, dismissing a writ of certiorari to the city council, after a hearing before the court without a jury. Dismissed.

¹Reported in 76 Pac. 79.

April 1904.]

Opinion Per MOUNT, J.

J. C. Cross, for appellant.*E. H. Fox*, for respondent.

MOUNT, J.—Appeal from a judgment of the superior court of Chehalis county, denying relief upon return to a writ of review. The city of Aberdeen granted to appellant a retail liquor license in said city, for the year commencing July 2, 1902, and ending July 2, 1903. On the 1st day of April, 1903, an order was issued by the city council of said city, directing appellant to show cause on the 8th why his license should not be revoked. On the 8th, the appellant “not being ready for trial,” the hearing was postponed by the city council for one week. On the 15th day of April, 1903, the appellant appeared by his attorney and confessed that the city council had authority to revoke his said license, which was accordingly done, and a rebate warrant was ordered drawn for the unexpired time of the license. Subsequently appellant made two unsuccessful efforts to have the city council reinstate his license. Thereupon he filed a petition in the superior court of Chehalis county for a writ to review the order of the city council revoking his said liquor license, alleging, among other things, that the city council revoked said license without authority and without cause. The writ was issued and a return was made thereto. Upon a hearing, on June 15, 1903, the court dismissed the writ.

Under the facts stated, it is clear that the appellant consented to the revocation of his license, and is therefore entitled to no relief upon the merits. But it will be noticed that the license expired on July 2, 1903. After that date appellant had no beneficial interest in the litigation, the controversy ceased, and there is now no live question before this court. Under the rule in *State ex rel. Cawley v. Bremerton*, 32 Wash. 508, 73 Pac. 477; *Hice v. Orr*, 16

Wash. 163, 47 Pac. 424; and *State ex rel. Daniels v. Prosser*, 16 Wash. 608, 48 Pac. 262, and many other cases, this appeal must be dismissed.

FULLERTON, C. J., and HADLEY, ANDERS, and DUNBAR, JJ., concur.

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34 556
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[No. 4812. Decided April 4, 1904.]

PETER JANCKO, *Appellant*, v. WEST COAST MANUFACTURING AND INVESTMENT COMPANY, *Respondent*.¹

MASTER AND SERVANT—NEGLIGENCE—DANGERS FROM VIBRATION OF SAW—DUTY TO WARN INEXPERIENCED EMPLOYEE. A master who employs a wholly inexperienced man to work in a shingle mill, and to remove slabs lodged near a saw, owes a greater duty to warn him of the danger of striking the saw and causing it to vibrate, than would be the case if the servant were experienced.

SAME—ASSUMPTION OF RISK. It cannot be said as a matter of law that a wholly inexperienced servant assumes the risks from the vibration of a saw, when he testifies that he did not know it would vibrate and one expert testified that there was nothing to indicate that it would.

SAME—INJURY TO INEXPERIENCED SERVANT IN REMOVING SLABS FROM SAW—DEFECTIVE APPLIANCES—LIGHT—FAILURE TO WARN—CONTRIBUTORY NEGLIGENCE—KNOWLEDGE OF VIBRATION OF SAW—EVIDENCE—SUFFICIENCY—QUESTION FOR JURY. It is a question for the jury as to whether the master was negligent in failing to give warning of the dangers, and in failing to provide sufficient light, whether the appliances were defective, and whether the plaintiff was guilty of contributory negligence, where it appears that he was set to work upon a knee-bolter and instructed to remove slabs that became lodged near the saw by inserting his hand into a six inch space beside the saw and through an opening twenty inches wide, that the space to be safe should have been thirty-six inches wide, that striking the saw with a slab in removing it would cause the saw to vibrate from side to side three or four inches, and three of plaintiff's fingers

¹Reported in 76 Pac. 78.

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Opinion Per HADLEY, J.

were cut off by such vibration of the saw in an attempt to remove a slab in the manner that had been illustrated to him by the operator, whose directions the foreman had instructed him to follow, that the place was dark and an electric light over the saw was not lighted, and that the plaintiff did not know that the saw would vibrate, and was wholly without experience, to the defendant's knowledge, and received no warning of any dangers in the operation.

SAME—SERVANT OBEYING ORDERS. Where a servant obeys orders to do a certain work, he has the right to rely upon the superior knowledge and skill of the master and to assume that he will not be exposed to unnecessary dangers.

Appeal from a judgment of the superior court for King county, Bell, J., entered July 9, 1903, dismissing an action for personal injuries sustained in attempting to remove slabs lodged near a saw, after withdrawing the case from the jury at the close of plaintiff's testimony. Reversed.

George F. Aust, for appellant.

Piles, Donworth & Howe, for respondent.

HADLEY, J.—This is an action to recover for personal injuries received in a shingle mill. At the trial the court granted a challenge to the evidence, interposed by the defendant at the close of plaintiff's testimony. The cause was withdrawn from the jury, motion for new trial was denied, and judgment was entered dismissing the action. The plaintiff has appealed.

There was evidence before the jury to the following effect: That appellant went to respondent's mill early in the morning and asked the foreman for work, but the latter asked him if he had ever before worked in a shingle mill, to which he answered that he had not; that the foreman then went with appellant to the knee-bolter, showed him how to put blocks in the conveyor, and then went away; that, as the foreman was leaving, appellant

called to him as follows: "I don't know what kind of job I got—I don't know what kind of job I get here;" that the foreman replied as follows: "That fellow show you;" and at the same time pointed to the operator of the knee-bolter; that the foreman gave him no other instructions, and he worked assisting the operator of the knee-bolter during that day, and on the following day the latter called his attention to the fact that a slab, in falling down beside the saw to the conveyor, had become lodged in the upper part of the conveyor, and immediately beneath the saw; that the operator told appellant to take the slab out, and that he was about to attempt to do so by using a stick to move it away from the saw, when the operator said to him, "Hold on," and came and took the slab out, at the same time saying, "I show you the first and last time;" that in removing the slab the operator put his hand and arm down beside the running saw, through the opening in the frame of the bolter, there being a space of five or six inches between the saw and the frame; that appellant saw no other lodged slab at that time, but later—the same day—he saw several similarly lodged, and then put his hand down through the opening beside the saw, and attempted to remove the slabs as he had seen the operator do; that, as he lifted the slabs, the saw caught them and was thereby caused to vibrate toward his hand and strike it, cutting off three fingers; that the place was dark, and the day cloudy; that an electric lamp hung above the saw, but was not lighted; that the slabs were sixteen inches in length, and the opening into the conveyor below the saw was twenty inches wide. A witness, introduced as an expert, testified that in order to be safe the opening into the conveyor should have been not less than thirty-six inches wide. He also

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Opinion Per HADLEY, J.

testified that a saw of the size of this one—fifty-four inches—will, when struck by some obstruction at the bottom, vibrate from side to side from three to four inches. Other expert witnesses testified similarly as to the vibration of the saw, and one other stated that there is nothing in the rotary motion to indicate that the saw will vibrate.

Respondent contends that no negligence on its part was shown, that appellant's injury resulted from his contributory negligence, and that the place where he put his hand was obviously dangerous. It will be remembered, however, that appellant was without experience in working about such machinery. He so informed the foreman before he began to work. With that knowledge, the foreman, as the master's representative, ordered him to work at the knee-bolter, and instructed him to follow the directions of the operator thereof. The latter therefore became the master's delegate in the matter of instructions as to appellant's work. Appellant was instructed by the operator to remove the slabs as he saw him do it. He saw the operator do it successfully, and with no harmful result. He attempted to do it in the same way, but failed, probably from lack of equal skill and experience. He testified that he did not know that the saw would vibrate in the manner in which it did. Being without such knowledge, either from former experience or by warning from respondent, we think it should not be said, as a matter of law, that he should have known of the danger, especially in view of the fact that he had seen a slab removed by the master's representative, who placed his hand at the same place, and who instructed him to do likewise.

Appellant was not employed as one having skill or experience for the work in hand, but as one who expressly

avowed that he was without such qualifications. The master, in accepting his services under such known circumstances, therefore owed him the duty to more fully instruct and warn him than would have been necessary in the case of one representing himself to be skilled and experienced, and who was employed as such. It was for the jury, and not for the court, to say whether respondent was negligent in failing to give appellant more specific instructions, and to warn him as to the danger from the vibration of the saw, if it should strike a slab or piece of timber, as it did. It was also for the jury to say whether, under the testimony, the device furnished by respondent was defective for the purpose, and also whether there was negligence in failing to provide sufficient light.

It has been so often held by this court that the question of contributory negligence is ordinarily for the jury that it seems unnecessary to cite the cases upon that subject. The only exception to the rule is that the facts must be such as show want of care to that degree which leaves no room, in the minds of reasonable men, for difference of opinion. We do not view the testimony submitted by appellant as presenting such facts. They are just such as may cause reasonable men to hesitate to say that appellant negligently contributed to his injury. In such a case, the facts are to be submitted to the twelve men who constitute a department of the court established by law for that purpose. In *Christianson v. Pacific Bridge Co.*, 27 Wash. 582, 68 Pac. 191, the court discussed the relative positions of master and servant, as relating to the right of the servant to rely upon the master's directions as to where the former shall work. It was there shown, by the cases cited and discussed, that the two

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Syllabus.

do not stand upon equal footing, even when they both have knowledge of the danger; that the position of the servant is one of subordination and obedience to the master, and that when the master orders the servant to perform certain work, the latter has a right to rely upon the superior knowledge and skill of the former, and to assume that the master, with such superior knowledge, will not expose him to unnecessary peril; and, though the servant has some knowledge of the danger, his right of recovery will not be defeated if, in obeying the order, he acts with the degree of prudence which an ordinarily prudent man would exercise under the circumstances. In view of the authorities discussed in that case, it was for the jury to say here whether the appellant acted the part of such prudent person, under all the circumstances. We therefore think the court erred in not requiring respondent to submit its evidence to the jury, and in granting the challenge to appellant's evidence.

The judgment is reversed, and the cause remanded with instructions to the lower court to grant a new trial.

FULLERTON, C. J., and ANDERS and DUNBAR, JJ., concur.

[No. 4746. Decided April 4, 1904.]

DANIEL FREW, *Appellant*, v. E. W. CLARK, *as Administrator of the Estate of John Hull, Deceased*,
Respondent.¹

APPEAL—BOND—JUSTIFICATION OF SURETIES. An appeal will not be dismissed because of defects in the form of the justification of the sureties on the appeal bond where no objection was made in the court below, as the objection is one going to the sufficiency of the sureties.

¹Reported in 76 Pac. 85.

STATUTE OF LIMITATIONS—CLAIM AGAINST DECEDENTS—ACTION UPON NOTE AND MORTGAGE—DEATH OF MAKER—PRESENTATION OF CLAIM AGAINST ESTATE—RIGHT OF ACTION ON NOTE SUSPENDED BY DEATH. Where the maker of a note secured by mortgage dies before the statute of limitations has run, the holder, upon presenting the claim to the administrator within the year limited to creditors, is entitled to have the same allowed against the estate, and such presentation will prevent the running of the statute of limitations against the note.

SAME—RIGHT OF ACTION ON MORTGAGE—BARRED AFTER SIX YEARS FROM MATURITY—NOT SUSPENDED BY DEATH OF MAKER. But in such case the right of action upon the mortgage is barred after the lapse of six years after the maturity of the note, since the death of the maker did not suspend the right of action on the mortgage, and upon the allowance of the claim against the estate, the holder is not entitled to any preferential rights in the mortgaged property.

Appeal from a judgment of the superior court for Columbia county, Chadwick, J., entered March 4, 1903, upon sustaining a demurrer to the complaint, dismissing an action brought to compel the allowance of claims against an estate. Reversed.

J. N. Pickrell and Thomas Neill, for appellant.

Lester S. Wilson and Samuel R. Stern, for respondent.

FULLERTON, C. J.—On January 10th, 1890, John A. Hull executed and delivered to Orley Hull his promissory note for \$600 due ten months after date; and on January 5th, 1891, he, together with his wife, S. R. Hull, executed and delivered their joint promissory note to B. G. Prater for \$640, due on November 1st of that year. These notes were secured by mortgages on real property situated in Columbia County, executed concurrently with the notes. John A. Hull died intestate in Columbia county on November 7, 1895, leaving estate therein consisting of real and personal property. On the 8th day of

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October, 1901, the respondent, E. W. Clark, was duly appointed administrator of his estate, and is now acting as such. Within the year after the appointment and qualification of the administrator, the appellant, who was then, and is now, the owner and holder of the notes and mortgages above mentioned, duly presented them to the administrator as claims against the estate of John A. Hull, deceased. The administrator rejected the claims, and this action was instituted to have them allowed. A demurrer to the complaint was interposed and sustained, and, on the appellant's refusal to plead further, judgment for costs, and of dismissal, was entered against him. This appeal is from the judgment so entered.

The respondent moves to dismiss the appeal, because of defects in the form of the justification of the sureties on the appeal bond, claiming that it does not appear clearly therefrom that the sureties justify in twice the amount of the penalty of the bond, or that each surety is worth the sum for which he justifies in his own right. The wording of this part of the bond is not as clear as it could have been made, but the bond is good against an objection made for the first time in this court. The objection is one going to the sufficiency of the sureties, and we have held that such an objection, to be available, must be taken in the court below. See, *Weiser v. Holzman*, 33 Wash. 87, 73 Pac. 797, where the cases will be found collected. The motion to dismiss must be denied.

From an examination of the dates above given, it will be observed that the maker of the notes, John A. Hull, died some five years after the first note matured, and that no administration of his estate was had until nearly five years and eleven months after his death. The trial court sustained the demurrer to the complaint on the ground

that the right to collect the notes from the estate of the deceased debtor was barred by the statute of limitations. The correctness of this ruling is the single question presented by this appeal.

The question presented was before this court, in substantially all of its aspects, in the case of *Gleason v. Hawkins*, 32 Wash. 464, 73 Pac. 533. In that case it was sought, by the process of issuing letters of administration on his estate, to hold certain real estate of a deceased debtor to the payment of a mortgage executed thereon some twenty-one years prior to the application for such letters, which application was made nearly eighteen years after the mortgagor's death. We held that the right to charge the real property with the lien of the mortgage was barred, both by the general statute of limitations, which limits the right to sue upon a written instrument to a period of six years from the time the cause of action accrues, and the special statute of 1895, which exempts the real property of a deceased person from liability for his debts unless letters of administration or letters testamentary are issued on his estate within six years from the date of his death. But we further held that the debt itself was kept alive by the latter clause of § 4810, Bal. Code, which provides:

"If a person entitled to bring an action die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced by his representatives after the expiration of the time and within one year from his death. If a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his representatives after the expiration of that time, and within one year after the issuing of letters testamentary or of administration;"

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and that the creditor was entitled to have his debt allowed as one of the acknowledged debts of the estate, to be paid in the ordinary course of administration.

These principles are controlling here. The debts represented by the promissory notes were not barred prior to the death of the debtor, and were presented for allowance to the administrator of the deceased debtor within one year after the issuance of letters of administration on his estate. This was the commencement of the action contemplated by the statute above quoted, and entitled the claim to be allowed as a claim against the estate, to rank with the other acknowledged debts of the estate, and to be paid accordingly.

The appellant, however, asks further that his claims be declared preferred claims against the real property described in the mortgages given to secure the same, but this question was also met and determined adversely to the contention in the case above cited. We there held that, as the lien of the mortgage was one that could be enforced by the mortgagee against the mortgaged property in a direct action even after the death of the mortgagor, the right was barred at the end of the general statutory period. That rule is applicable here. The appellant, therefore, while he has the right to have his claim allowed as a general claim against the estate, has no preferential rights in any of the property thereof, but stands in the position of a general creditor.

As we base this decision wholly on a former decision of this court, it is but fair to the trial judge to say that the decision relied on was not announced by this court until after the judgment in this case had been entered in the court below.

The judgment is reversed, and the cause remanded with instructions to enter a judgment directing the adminis-

trator of the estate of John A. Hull, deceased, to allow the claims sued upon as claims against that estate, to rank with the claims of other general creditors.

DUNBAR, HADLEY, and MOUNT, JJ., concur.

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[No. 4437. Decided April 4, 1904.]

JAMES H. LITCHFIELD, *Respondent*, v. HENRY T. COWLEY *et al.*, *Appellants*.¹

LIMITATION OF ACTIONS — COVENANT TO PAY TAXES — ACTION ACCRUES WHEN TAXES BECOME DUE. Where the defendant, having agreed to purchase land of the plaintiff within two years, covenanted to pay all taxes that might be levied upon the property during said two years, and defaulted, and the plaintiff subsequently paid said taxes, the right of action upon the covenant to pay the taxes accrued when the said taxes became due, and the right of action is barred after the lapse of six years; since the contract is not simply one of indemnity and is not postponed until the plaintiff has paid the same.

Appeal from a judgment of the superior court for Spokane county, Prather, J., entered April 9, 1902, upon the verdict of a jury rendered in favor of the plaintiff after a trial on the merits, in an action upon a contract. Reversed.

Blake & Adams, for appellants.

Hamblen & Lund, for respondent.

PER CURIAM.—This was an action brought in the superior court of Spokane county on the 29th day of January, 1902, by James H. Litchfield, plaintiff and respondent, against Henry T. Cowley and Henry T. Cowley as executor of the last will and testament of Lucy A. Cowley, deceased, defendants and appellants, to recover damages for

¹Reported in 76 Pac. 81.

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Opinion Per Curiam.

breach of covenant to pay taxes and assessments levied upon certain real estate situate in the city of Spokane. The cause was tried to a jury. A verdict was rendered in favor of plaintiff for \$885.34. Judgment having been entered thereon, defendants appeal.

. On the 4th day of December, 1891, respondent, James H. Litchfield, and his wife, Jane A. Litchfield, entered into a written contract with Edith Clara Cowley, who acted on behalf of the above named Henry T. and Lucy A. Cowley (husband and wife). By the terms of this agreement, the Litchfields agreed to convey the above real estate to the Cowleys by a good and sufficient deed of general warranty, free from incumbrances. The Cowleys agreed to pay for such real estate \$4,000 on or before December 4, 1893, with interest thereon at the rate of ten per cent per annum, payable semi-annually, said installments of interest being "evidenced by four certain promissory notes, dated respectively December 4, 1891, June 4, 1892, December 4, 1892, June 4, 1893, and December 4, 1893, of two hundred dollars each, said notes being signed by Edith C. Cowley, and payable to James H. Litchfield and Jane A. Litchfield." This contract was signed by the Litchfields and Edith C. Cowley, but it is admitted by the pleadings that the latter party executed this agreement on behalf of Henry T. Cowley and Lucy A. Cowley, now deceased. The Cowleys further agreed "to pay all taxes and assessments that may be levied or assessed upon said property during the said term of two years." By the subsequent agreement of the parties, the time for the performance of this contract was extended two years—that is to say, until January 1, 1895.

The complaint alleges, that on the 17th day of May, 1895, the respondent paid to the county treasurer the

county and city taxes levied upon this property for the years 1893 and 1894, amounting to \$226.43; that on the 21st day of June, 1894, an ordinance was passed by the city of Spokane, reassessing such property for street improvements in the sum of \$354.75, which reassessment was duly confirmed by said city; that on February 8, 1898, respondent paid said sum of \$354.75 to said city; that on the 11th day of March, 1892, the city of Spokane passed an ordinance assessing a portion of said property for \$1,024.30 for grading Hillard street, in said city; that on the 19th day of April, 1899, respondent compromised with said city the above assessment by paying the sum of \$137.70. The complaint further alleges that the appellants have been often requested to pay said sums of money with interest, but have failed and refused so to do; that respondent filed his duly verified claim and statement for the above demands with the executor of Lucy A. Cowley, deceased, which claim was disallowed. Respondent demanded judgment accordingly.

The appellants demurred to the complaint, and, among other grounds, alleged that the action was not commenced within the time limited by law. The trial court overruled such demurrer, and appellants excepted. The appellants thereupon answered, and, among other defenses, set up the six year statute of limitations. Respondent demurred to this defense. This demurrer having been sustained by the lower court, appellants excepted. It is admitted by the pleadings that the Cowleys did not pay the purchase money for this property, as provided in the contract. The cause went to trial on the issues as thus formulated by the pleadings, and resulted in a verdict and judgment for respondent, as above stated.

The appellants' assignments of error present but one

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proposition for the consideration of this court: Was the respondent's right of action herein barred by the statute of limitations on the 29th day of January, 1902, when the present action was begun? Sections 4796 and 4798, subd. 2, Bal. Code, provide that, an action upon a contract in writing, or liability express or implied arising out of a written agreement, can only be commenced within six years after the cause of action shall have accrued, except in special cases not necessary to be considered in this connection. The appellants contend that the lower court committed reversible error in sustaining respondent's demurrer to the second defense, setting up the six year statute of limitations, on the theory that respondent's cause of action did not accrue until he paid these taxes and assessments, and that therefore respondent's right to bring the present action was not barred, under the provisions of this statute, when this suit was begun.

The argument of appellants, as we understand it, is based upon the proposition that the covenant of the Cowleys to pay these taxes and assessments was primary, affirmative, and positive in its language, and not secondary or collateral; that the respondent could have sued the Cowleys for breach of this covenant on January 2, 1895, and recovered substantial damages, without having first paid such taxes and assessments; that hence this cause of action accrued at that time. The respective counsel for appellants and respondent have cited no authority bearing directly on this question, which seems to be somewhat involved and not free from difficulty. The case of *Donovan v. Judson*, 81 Cal. 334, 22 Pac. 682, 6 L. R. A. 591, cited by appellants' counsel, was an action to recover on an independent covenant for the payment of the purchase money named in the agreement for the sale of real estate. The time of payment was fixed by the terms

of the contract, but it was left indefinite as to the time when the conveyance was to be executed. The court decided, and we think correctly, that the plaintiffs' right to bring suit was barred, under the California statute, after four years from the time fixed for the payment of the purchase money. In that case the promise was made directly in the covenant by the defendant to plaintiffs' intestate to pay a definite sum of money with interest. In the present controversy, the respondent is not suing to recover the purchase money, nor on any promise to pay money directly to him, or to the Litchfields, whom he represents in this transaction.

The respondent presses upon our attention the case of *Post v. Campau*, 42 Mich. 90, 3 N. W. 272, as an authority in point sustaining the ruling of the court below on the question of the statute of limitations, contending that the covenant in question is one of indemnity, not affirmative and positive in terms, and not entitling respondent to sue thereon until he shall have suffered damages by payment of the above taxes and assessments. This authority last cited was an action on a covenant contained in a deed.

"The said parties of the first part for themselves, heirs, executors and administrators, do covenant, grant, bargain and agree to and with the said party of the second part, his heirs and assigns, that they, the said parties of the first part, have not heretofore done, committed, or wittingly, or willingly suffered to be done or committed any act, matter or thing whatsoever whereby the premises hereby granted or any part thereof is, are or shall or may be charged encumbered in title or estate or otherwise."

This deed was made to defendant in error, Daniel J. Campau, by deceased, Theodore J. Campau, and others, of a tract of land, on December 19, 1866. Prior to that

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date, Theodore J. Campau's interest in this real estate was sold on execution, and bid in by the judgment creditors; Theodore failed to redeem. The title under the execution sale was transferred to Milton H. Butler, who in 1872 brought ejectment to recover possession; and, after some five years of litigation, defended by Daniel at the request of Theodore Campau, plaintiff obtained judgment. When the litigation was ended, Daniel bought up the title of Butler, paying therefor something over \$7,000. Theodore J. Campau died intestate in 1875. August 18, 1878, the claimant presented the said claim against the estate of Theodore; it was disallowed by the probate court, and the claimant then appealed to the circuit court. In that court judgment was rendered in his favor. Theodore's representatives prosecuted error to the supreme court. Judge Cooley, who delivered the opinion of the court, observed that it was not disputed that the outstanding execution sale created a liability against Theodore J. Campau at the time of his conveyance above noted. The learned jurist proceeded to remark, further, "It is contended, however, that his covenant was broken as soon as made, and that the remedy to recover damages for the breach was lost by the failure to institute suit, or to present the claim within the time limited by statute." The statute of Michigan at that time provided that a suit upon covenant must be brought within ten years after the right accrues. The statutory time between the execution of the deed and the presentation of the claim had elapsed. In this connection Judge Cooley uses the following language:

"As the terms of the covenant sued upon were falsified by facts existing at the time, a technical breach may be said to have then taken place; but as no damage followed from this breach, until the claimant purchased from But-

ler more than ten years afterwards, the rule that the claimant's right of action shall be deemed to have arisen at the delivery of the deed involves this manifest absurdity, that the claimant's remedy was barred before he was damnified—a result that can scarcely be consistent with any just or proper rule of law."

and expresses it as his opinion that, though there was a technical breach of the covenant when the deed was delivered, there was no substantial damage until the claimant paid the above sum of money, and that therefore the statutory limit had not expired when this claim was presented. Just before concluding the opinion, Judge Cooley says:

"So far I have expressed my own views, and have not spoken for any one else. My brethren think that the broad question I have discussed is not involved. They are of opinion that the covenant is special, and that it looks to the future, and promises indemnity for damages that may at any time in the future result from the breach. In this view it is immaterial whether the ordinary covenant against encumbrances would or would not be broken finally, if at all, at the delivery of the deed containing it."

The covenant in this last case seems to have been one of indemnity against incumbrances, rather than one to do specific acts similar to the payment of taxes and assessments that may have been levied between certain periods of time. The language of the covenant in the above deed seems to be general in its terms, whether applied to existing incumbrances, or to those that may arise or become crystallized in the future from a source existing anterior to the execution of the deed of conveyance. Unquestionably, if the covenant involved in the present controversy is to be construed as one of indemnity, the respondent's cause of action for substantial damages did not accrue till he discharged the taxes and assessments mentioned in his com-

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plaint. But, on the other hand, if the covenant of the Cowleys in that behalf was positive and affirmative, the present cause of action accrued when it became the duty of the Cowleys to pay such incumbrances or liens specially named in the instrument. Rawle on Covenants for Title (5th ed.), § 74.

The case of *Rector etc. of Trinity Church v. Higgins*, 48 N. Y. 532, appears to have a more direct bearing on the facts involved in the case at bar than any other authority to which our attention has been directed. The syllabus thereof fairly states the points decided:

"A covenant in a lease whereby the lessee agrees to bear, pay and discharge all taxes and assessments which shall be imposed upon the demised premises during the term, is broken when the lessee neglects to pay a tax or assessment duly imposed. It is not simply a contract of indemnity, but by it the tax or assessment, as between the parties, becomes the debt of the lessee. The lessor therefore can maintain an action thereon without first paying the tax or assessment, and as damages he is entitled to recover the amount of such tax or assessment.

"Parties have the right to make a contract contravening the rule that actual compensation will only be given for actual loss, and when the intent so to do is expressed in apt and suitable language courts of justice will enforce it.

"The fact that neither the particular tax or assessment, nor the time of payment, nor the person or corporation to whom payable are stated in the covenant, does not make it one for indemnity merely. That is certain which is capable of being rendered certain.

"Nor is it an objection that there is a risk attendant upon the payment of the judgment without prepayment of the tax or assessment. The lessee can make payment even after judgment, and upon application to the court after such payment the collection of the judgment, except as to costs, will be stayed, and upon payment of costs satisfaction will be ordered."

That able court, on page 537 of the same volume, uses the following language in distinguishing between covenants for indemnity and agreements to do particular acts to obviate damage:

"The rule may be definitely drawn from numerous cases, that where indemnity only is expressed, damages must be sustained before a recovery can be had; but a positive agreement to do an act which is to prevent damage to the plaintiff, will sustain an action where the defendant neglects or refuses to do such act."

Numerous authorities are cited in support of the position of the court in this respect. The principles of law enunciated in that case, as far as we are able to learn, have never been questioned by the court of last resort in New York, but have been sustained by numerous subsequent decisions of the courts of that state. In *Smart v. Smart*, 24 Hun 127, this rule of law was applied to an agreement for the sale of real estate.

It is true, as respondent contends, that no time is mentioned in the contract sued on for the payment of these taxes and assessments, and that the question as to the statute of limitations was not involved in the case of *Rector, etc., v. Higgins, supra*. But the principles of law announced therein are significant, when we come to make the application to the facts in this controversy as presented by the record, in that the covenant of the Cowleys to pay the taxes and assessments on this realty was one looking to the prevention of damage, and not an agreement of indemnity to pay damages that the Litchfields or respondent might suffer by reason of the default of the Cowleys in that regard. Bearing in mind the rule that that is certain which can be made certain, it would logically follow that respondent's cause of action accrued when the above taxes and assessments became due, with-

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out regard to the time or dates of actual payment by respondent. These taxes and assessments, except the taxes levied in 1894 against this realty, were due and payable prior to January, 1895. Under our statutes, Laws of 1893, p. 353, § 68, the county treasurer was not authorized to receive the taxes levied in 1894 prior to the second Monday in January following. Laws of 1895, p. 513, § 14, provides that all taxes levied for the preceding year shall be due on or before the 31st day of May in each year succeeding the levy, after which date they shall become delinquent, with certain exceptions unnecessary to mention here. The contract in question was doubtless made when the revenue statute of 1891 was in force, the provisions of which enactment were dissimilar to the law of 1895, with regard to the collection and payment of taxes.

Applying these rules of law to the facts before us, we are of the opinion that respondent's cause of action in the case at bar accrued not later than June 1, 1895; that, as more than six years had elapsed between that date and the bringing of the present action, the statutory bar was complete, and that the superior court erred in sustaining the demurrer of respondent to the second defense of appellants' answer setting up as a defense the statute of limitations.

The judgment of the trial court is reversed, and the case remanded with instructions to overrule such demurrer, and for further proceedings not inconsistent with this opinion.

[No. 4814. Decided April 4, 1904.]

JOHN GROVER DONALD, *by his Guardian, etc., Respondent*, v. CITY OF BALLARD, *Appellant*.¹

INFANTS—ACTION FOR PERSONAL INJURIES—DAMAGES INCLUDING EXPENDITURES FOR MEDICAL ATTENDANCE—SUIT BY FATHER AS GUARDIAN EMANCIPATING MINOR. In an action for personal injuries sustained by a minor it is not error to permit the recovery to include expenditures for medical attendance, objected to because the minor had no capacity to sue therefor, when the action was brought by the father as guardian *ad litem* for the minor, since thereby the father emancipates his son in respect thereto, and would be barred from recovering for the same in his own name.

Appeal from a judgment of the superior court for King county, Griffin, J., entered April 29, 1903, upon the verdict of a jury rendered in favor of the plaintiff for \$600 for injuries sustained due to a defective sidewalk. Affirmed.

John W. Whitman, for appellant.

McCafferty & Kane, for respondent.

HADLEY, J.—This is an action for damages for personal injuries, alleged to be due to a defective sidewalk negligently maintained within the limits of the defendant city. The injured plaintiff, John Grover Donald, is a minor, and the suit was brought by Thomas B. Donald as guardian *ad litem*, the latter being also the father of said minor. The complaint alleges in detail damages as follows: \$10,000 for injury to the leg, \$5,000 for pain and suffering, and \$300 for expenses for medical attendance, nursing, and medicines in aiding and attempting to cure the injury. The jury returned a verdict in the sum of \$600. The city moved for judgment notwith-

¹Reported in 76 Pac. 80.

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standing the verdict, but the motion was denied. This was followed by a motion for arrest of judgment, which was also denied. Judgment was then entered for the amount of the verdict, and the city has appealed.

As appellant's counsel says, in his brief, all errors urged in this court are predicated upon the complaint, and all point to the one objection, that the plaintiff had no legal capacity to sue for the claim of \$300 for medical attendance, nursing, and medicine. Testimony of the physician as to the value of his services was introduced without objection, and the court instructed the jury that they should include in their verdict such a sum for that purpose as they should find from the evidence would compensate the plaintiff, not exceeding the sum of \$300, the amount demanded in the complaint for that item of alleged damage. The verdict returned was general, and no sum was specified for the above item, or for any other in particular.

Appellant's argument is that no cause of action lies in favor of the minor for the recovery of amounts expended for medical attendance and nursing, but that the father alone can maintain an action therefor. Since this action is brought in behalf of the minor only, it is urged that a recovery in this suit for expenses of medical services and nursing will not be a bar to recovery by the father in another action.

In the case of *Daly v. Everett Pulp & Paper Co.*, 31 Wash. 252, 71 Pac. 1014, this court held that, when a suit is brought for damages arising from injuries to a minor, and when the action is brought in behalf of the minor with the father's consent, for damages which would otherwise be recoverable by the father, the latter cannot afterwards be heard to say that he has a demand of his

own for the same items of damage which were included in the former suit. It was held that, under such circumstances, the father has emancipated his son in so far as the right to recover damages which were included in the son's suit is concerned. Such is the case here. That the father consented to this recovery by the son is manifest, since he himself caused the action to be brought in his own name as guardian *ad litem*, and specifically included the item of damage here under discussion. Under the case cited, the minor was authorized to recover this item of damage, and the father cannot again, in his own behalf, recover for the same damage. The court, therefore, did not err in its construction of the complaint, and in its instructions to the jury that they could consider said item of damage.

The judgment is affirmed.

FULLERTON, C. J., and ANDERS, DUNBAR, and MOUNT, JJ., concur.

[No. 4422. Decided April 5, 1904.]

JOHN O. FISHER, *Respondent*, v. PUGET SOUND BRICK,
TILE AND TERRA COTTA COMPANY, *Respondent*,
AND LARRIS CAIN, *as Receiver, Appellant*.¹

JUDGMENTS—VACATION—JUDGE PRO TEMPORE—JURISDICTION TO HEAR MOTION TO VACATE JUDGMENT. Where a case is heard by a judge *pro tempore* appointed for the purpose, he has jurisdiction to hear and determine a motion to vacate and set it aside.

JUDGMENTS—VACATION—NOTICE OF ENTRY UNNECESSARY—SUFFICIENCY OF SHOWING—DISCRETION IN REFUSING TO VACATE. It is not error to refuse to vacate a judgment made nine months after its entry, because of failure to serve notice thereof and

¹Reported in 76 Pac. 107.

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of the findings of fact and conclusions of law, upon the affidavit of counsel that he had no notice of the judgment for a "long time" after its entry and would have perfected an appeal if he had had notice in time, where opposite counsel make affidavit that actual notice was given orally and by leaving a copy at the attorney's office, and that they conversed about the judgment two months after its entry, since it is unnecessary to give notice of the time and place of signing a judgment, and no abuse of discretion appears in refusing to vacate the judgment on the showing made.

Appeal from an order of the superior court for King county, Hon. Frank P. Lewis, judge *pro tempore*, entered April 17, 1902, denying a motion to vacate a judgment, after a hearing upon affidavits. Affirmed.

J. J. McCafferty and *William Welch*, for appellant.

R. R. George and *George E. de Steiguer*.

PER CURIAM.—Larris Cain, as receiver, appeals from the following order made by the superior court of King county, in the case of John O. Fisher, plaintiff (respondent), against Puget Sound Brick, Tile and Terra Cotta Company, defendant (also a respondent), in which action Larris Cain is named as receiver of said company:

"The motion of Larris Cain to vacate the findings of fact, conclusions of law and decree made and entered herein, came on regularly for hearing before the Honorable Frank P. Lewis, Judge *pro tempore*, herein, upon the 16th day of April, 1902, the said Larris Cain appearing by his attorney, James J. McCafferty, and the defendants, Puget Sound Brick Tile and Terra Cotta Company and William A. Trinkle, appearing by their attorney, R. R. George, and by G. E. de Steiguer, of counsel.

"Thereupon at the commencement of said hearing, the said Larris Cain, by his counsel, objected to said motion being heard by the said Frank P. Lewis, judge *pro tempore* herein, and excepted to the jurisdiction of said judge *pro tempore*, which said objections and exceptions

were overruled by the court, to which ruling the said Larris Cain, by his counsel, excepted, and such exception was allowed; and thereupon, said hearing proceeded.

"Affidavits were read in support of and against said motion, and after the argument of counsel, said hearing was duly continued till this 17th day of April, 1902. And now, at the time and place to which said continuance was had, the court being fully advised in the premises, denies said motion.

"WHEREFORE, it is hereby ordered, adjudged and decreed, that said motion of the said Larris Cain to vacate and set aside said findings of fact, conclusions of law and decree, be and the same is hereby denied, to which denial of said motion said Larris Cain, by his counsel excepts, which said exception is by the court allowed; and said Larris Cain gave notice in open court that he appeals from this order to the supreme court.

"Done in open court this 17th day of April, 1902."

It is first contended by appellant that Hon. Frank P. Lewis, as judge *pro tempore* in the court below, was without authority and jurisdiction to hear and determine the motion to vacate the findings, conclusions, and decree designated in the above order. No question is raised regarding the regularity of the appointment of the judge *pro tempore*. The record shows that this motion was regularly entered, on the motion calendar of said court, for hearing on March 29th 1902, and upon that day this motion came on for argument before Hon. G. Meade Emory, the presiding judge of such court. Judge Emory held "that he had no jurisdiction to hear this motion and that it should come up before the Hon. Frank P. Lewis, who presided as judge *pro tempore*, and made the original findings and decree." Judge Emory, therefore, dropped the motion from his calendar, to which Cain excepted. We are of the opinion that the superior court, per Judge Emory presiding, committed no error in refusing to enter

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tain the motion to vacate such findings, conclusions, and decree; that Judge Lewis was duly vested with authority and jurisdiction to hear and determine this motion, and make the order in question; that the case at bar in that particular falls squarely within the rule announced by this court in *State ex rel. Cougill v. Sachs*, 3 Wash. 691, 29 Pac. 446. In that case it was held, that a judge *pro tempore* of the superior court, appointed to try, hear, and determine the action, retained jurisdiction to the end. See, also, *Nelson v. Seattle Traction Co.*, 25 Wash. 602, 66 Pac. 61.

It is next urged that the trial court erred in denying appellant's motion to vacate and set aside the above findings, conclusions, and decree. The record shows that on May 14th, 1901, Judge Lewis made certain findings and conclusions of law, which were filed in the clerk's office of the lower court on the same day. On the 25th day of May, 1901, said judge signed the decree based upon these findings and conclusions, which decree was filed on June 12, 1901. On March 25, 1902, J. J. McCafferty, Esq., made and filed an affidavit in this cause, in which he stated, "that he is and was at all times the attorney of record for Larris Cain, as receiver, in the above entitled action; that no service of the alleged findings of fact, conclusions of law, and decree, was ever made upon this affiant, and that he had no knowledge of such findings of fact, conclusions of law, and decree until long after the same was entered; and that it was his intention to appeal from the decree so entered had he had notice of the time of same in time therefor." This affidavit was the basis of appellant's motion to vacate the findings, conclusions, and decree to which reference has already been made in the consideration of appellant's first assignment of error.

In the court below, counter affidavits of R. R. George and G. E. de Steiguer were submitted on the hearing of this motion. The former swore that he was the attorney of the Puget Sound Brick, Tile and Terra Cotta Company, one of respondents, at the final hearing of said action in the trial court; that, at the conclusion of the testimony, it was arranged between affiant, said McCafferty, and Judge Lewis, that each party should prepare and submit proposed findings of fact and conclusions of law; that "affiant prepared and submitted to said court such proposed findings and conclusions, and served a copy thereof upon said McCafferty, and the said McCafferty prepared and submitted to said court such proposed findings and conclusions." Affiant George further stated, that he endeavored to get McCafferty to agree upon a time for the argument of the merits of such findings and conclusions; that McCafferty informed affiant he did not wish to argue said matters, and was willing to let the court decide thereon without argument, and to make and sign such findings and conclusions as it might deem proper; that affiant informed Judge Lewis of said statement, and that said judge thereupon signed said findings and conclusions, except as regards certain items charged against appellant, as receiver, which were stricken out; that affiant immediately thereafter notified said McCafferty of the signing of such findings and conclusions with the said alterations, and offered to make such changes in the copies theretofore served upon McCafferty, but that the copies could not be found; that, about one or two months after the entry of the above decree, affiant George had a conversation with McCafferty, in which conversation the latter asked affiant about the amount of the judgment entered upon hearing of the above matter; and that, upon the day

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of the rendition of such decree, affiant left a copy thereof at the office of said McCafferty in Seattle on his desk, he being absent, between the hours of 6:00 o'clock A. M. and 9:00 o'clock P. M. G. E. de Steiguer also swore that on the 3rd day of December, 1901, the appellant and his sureties on the receiver's bond were personally served with a summons and complaint in an action brought in the superior court of King county, by said company and others, against Larris Cain and his sureties. Copies of the summons and complaint are incorporated in the statement of facts. This complaint refers definitely to these findings, conclusions, and decree. The appellant Cain did not controvert the statements made in the affidavits of George and de Steiguer.

The chief contention made by appellant in the affidavit of Mr. McCafferty is that it was the intention of the receiver Cain to appeal from the decree, had he received notice thereof in time. It is significant to note in this connection that Mr. McCafferty fails to state in his affidavit that he had no knowledge or information as to the signing of such findings, conclusions, and decree until after the time had elapsed for taking an appeal to this court. He leaves that important feature to be inferred, by stating that he had no such knowledge until a long time after the decree was entered. What he considered "a long time" is shrouded in uncertainty. Moreover, we have the uncontroverted sworn statements of attorney George that appellant's attorney was served with a copy of the decree in question, in the manner above stated, and that he was personally cognizant of the entry of such decree in time to have appealed therefrom to this court. The appellant fails to allege any sufficient excuse for not excepting to the findings and conclusions of the trial court within five days after he

or his attorney had knowledge thereof. No exception was necessary to review on appeal the order and judgment entered June 12, 1901, against the receiver Cain. Pierce's Code, § 668; Bal. Code, §5051; *Taylor v. Spokane Falls & Northern R. Co.*, 32 Wash. 450, 73 Pac. 499. This court held, in *Brooks v. James*, 16 Wash. 337, 47 Pac. 751, in construing Laws of 1893, p. 112, § 3, (Pierce's Code, § 669), that it was unnecessary to give appellant notice of the time and place of signing the judgment in the action. In *Western Security Co. v. Lafleur*, 17 Wash. 406, 49 Pac. 1061, the following language is used: "It is not necessary for the validity of a decree or judgment that it be served upon any party to the cause after the same is filed." In the recent case of *Kinkade v. Witherop*, 29 Wash. 10, 69 Pac. 399, this court says:

"It appears that the trial court entered a judgment immediately upon filing its findings of fact and conclusions of law, which were filed in the absence of and without notice to the appellant's counsel. It is contended that the statute (§ 5052, Ballinger), inasmuch as it allows the party desiring to except to the findings five days in which to do so after service of the same upon him when signed subsequently to the hearing and in his absence contemplates that the judgment shall not be entered until the exceptions are filed, or the time for excepting has expired. While, perhaps, this may be the better practice, as it gives to the trial court an opportunity to review its findings in the light of the exceptions, it does not constitute reversible error. The losing party may still except within the time, and appeal in the regular way. It does not drive him, as the appellant suggests, to a motion or petition to vacate, in order to have the judgment reviewed on appeal."

See, further, *Iruin v. Olympia Water Works*, 12 Wash. 112, 40 Pac. 637; *Braely v. Marks*, 13 Wash. 224, 43 Pac. 27.

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Syllabus.

The application to vacate the decree was addressed largely to the discretion of the trial court, and could at best be reviewed only for an abuse of that discretion. No such abuse appears. *Bozzio v. Vaglio*, 10 Wash. 270, 38 Pac. 1042; *Kuhn v. Mason*, 24 Wash. 94, 64 Pac. 182.

No reversible error appearing in the record, the order and judgment appealed from must be affirmed.

[No. 4966. Decided April 6, 1904.]

J. S. ELLIOTT, as Administrator of the Estate of E. B. Earle, Deceased, Appellant, v. FRANK R. HAWLEY et al., Respondents.¹

HUSBAND AND WIFE—SEPARATE PROPERTY OF WIFE—ACQUIRED BY EFFORTS OF WIFE UNDER LAWS OF OREGON. Where a married woman living with her husband near a mining claim in Alaska takes a half interest in a lay thereon, hires a man to perform half the work, who is paid out of her share of the clean-up, and she personally supervises the work, her net proceeds are her separate property under the laws of Oregon so providing as to property acquired by a married woman "by her own labor," although she performed no manual labor thereon, the law meaning, by her own efforts.

SAME—SITUS OF PARTNERSHIP PROPERTY—SEPARATE PROPERTY OF WIFE REMOVED TO THIS STATE—NOT SUBJECT TO HUSBAND'S DEBTS. Where by the laws of Oregon the profits of a mining venture made by a married woman in Alaska became her separate property, and were brought to this state and deposited as the funds of the partnership by which it was acquired, her share remains her separate property, and real estate purchased by her and paid by a check of said partnership in a sum less than the amount due her, is not subject to her husband's separate debt.

SAME—RESTRICTIONS AGAINST PARTNERSHIP BETWEEN HUSBAND AND WIFE. The restrictions against a husband and wife's entering into a partnership are only to protect the wife from the husband's debts, and not to deprive her of her property.

¹Reported in 76 Pac. 93.

SAME — COMMINGLING WIFE'S SEPARATE FUNDS WITH HUSBAND'S. Where the amount invested by both husband and wife in a joint venture is definite and it yields a definite increase, there is no such commingling or confusion of the separate interests as to lose their identity.

Appeal from a judgment of the superior court for King county, Albertson, J., entered August 11, 1903, upon findings in favor of the defendants, after a trial before the court without a jury, dismissing an action to subject real estate to execution sale. Affirmed.

Embree & Cole and C. S. Preston, for appellants.

Carr & Preston, for respondents.

HADLEY, J.—The purpose of this action is to subject certain real estate in the city of Seattle to execution sale. The suit was brought by the appellant, as administrator of the estate of E. B. Earle, and against the respondents, who are husband and wife. On the 3d day of June, 1898, respondent Frank R. Hawley executed his promissory note for the sum of \$1,000, payable to the order of one Shedd, who afterwards transferred it to the said E. B. Earle, the latter being now deceased. Said Hawley claims that the note was given merely as an accommodation to said Shedd to enable him to raise some money, but that question is immaterial here, since a judgment founded upon the note was rendered in favor of the administrator of Shedd's deceased assignee, and against said respondent, in the superior court of King county, on the 6th day of January, 1902. There was no appeal from said judgment, and it is sought here to have it declared that the judgment is a lien upon the said real estate, and that the land is subject to levy and sale for the satisfaction of the judgment.

At the time said note was made the said Frank R. Hawley was unmarried. Afterwards, on the 9th day of

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July, 1898, he and his co-respondent became husband and wife. The obligation represented by the note was therefore the separate debt of Frank R. Hawley. The real estate in controversy was conveyed to the respondent Katherine W. Hawley on or about October 24, 1899, and the complaint alleges that it was purchased with the separate funds of the husband. It is averred that the conveyance was made to the wife without consideration paid or agreed to be paid by her, and in furtherance of a fraudulent scheme and design, on the part of both husband and wife, to cheat, delay, and defraud the creditors of the husband. The answer denies said allegations, and affirmatively alleges that the property was purchased with the separate funds of Katherine W. Hawley, and that the same is her sole and separate property.

A trial was had before the court without a jury. The findings of the court cover many details, and, while we deem it unnecessary to set them all out, yet a somewhat extended statement of the facts found will lead to a better understanding of the case. The court found, that respondent Frank R. Hawley had not been a resident of the state of Washington at any time during the ten years last past, and that respondent Katherine W. Hawley has never been a resident of the state; that the respondents were married in the state of California, and thereafter, in the autumn of 1898, living together as husband and wife, they took up their abode at or near claim No. 9 above Discovery, on Little Minook Creek, Alaska; that said claim No. 9 was owned by a corporation in which said Frank R. Hawley was a stockholder; that about said time said Hawley and his uncle, one Reasoner, planned to take a lay, or contract for working on shares, on a portion of said claim; that thereafter said Hawley was made manager of

said corporation, and of its operations on said claim, and said lay was then taken by said Reasoner and Katherine W. Hawley in equal shares.

It was also found, that the work upon the lay was performed by said Reasoner and another, the latter being paid for his services from Mrs. Hawley's share of the clean-up; that Mrs. Hawley did not perform actual manual labor upon the claim, but that she was frequently on said lay ground while the work was progressing, inspected the same, and consulted with her partner Reasoner concerning the work; that, as a result of the work upon the lay and the clean-up therefrom, Mrs. Hawley's net share of the proceeds was about \$450, which sum, by her authority and direction, was, by her husband, invested for her in the spring of 1899; that said investment was in a partnership known as Mitchell & Co., composed of the two respondents and one Archie Mitchell; that the husband invested in the partnership an equal amount of his own funds, and that said Mitchell owned a half interest in the partnership, leaving a one-fourth interest each to Mr. and Mrs. Hawley; that the partnership operations were on Anvil Creek, near Nome, Alaska, and the gold representing the partnership's share of the clean-up was brought to the United States assay office at Seattle, Washington, in one entire lot, converted into money, and deposited in a bank at Seattle to the credit and in the name of Mitchell & Co.; that the purchase price of said real estate was paid by a check on said deposit, drawn by respondent F. L. Hawley, in the firm name of Mitchell & Co., in favor of E. M. Carr, who was acting as attorney and agent for Mrs. Hawley in the purchase of the lots; that it was understood, and in good faith believed, both by Hawley and his wife, that the money so invested was the separate money of Mrs. Hawley.

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The findings also set out in full a number of sections from Hill's Annotated Laws of Oregon, as being, by virtue of the United States statutes, in full force and effect throughout the territory of Alaska until June 6, 1900. Among other provisions of said statutes are the following:

"§ 2992. The property and pecuniary rights of every married woman at the time of her marriage, or afterwards acquired by gift, devise or inheritance, shall not be subject to the debts or contracts of her husband, and she may manage, sell, convey, or devise the same by will to the same extent and in the same manner that her husband can property belonging to him."

"§ 2993. The property, either real or personal, acquired by any married woman during coverture, by her own labor, shall not be liable for the debts, contracts or liabilities of her husband, but shall, in all respects, be subject to the same exceptions and liabilities as property owned at the time of her marriage or afterwards acquired by gift, devise or inheritance."

"§ 2873. Neither husband or wife is liable for the debts or liabilities of the other incurred before marriage, and except as herein otherwise declared they are not liable for the separate debts of each other, nor is the rent or income of such property liable for the separate debts of the other."

"§ 2997. Contracts may be made by the wife and liabilities incurred, and the same enforced by or against her to the same extent and in the same manner as if she were unmarried."

It was further found that, at the time said conveyance was made to Mrs. Hawley, her husband was wholly solvent, and that he then and afterwards had on deposit, in the Washington National Bank of Seattle, moneys belonging to him largely in excess of his total indebtedness. From the facts found, the court concluded that the lands purchased became the sole and separate property of Mrs. Haw-

ley, and that her husband has never at any time had, and has not now, any interest therein. Judgment was entered denying the demand of the complaint and dismissing the action. The plaintiff has appealed.

Errors are assigned upon the court's findings, but we are satisfied, after reading the evidence, that the facts as found by the court are sustained by the evidence submitted. If there was no error in the conclusion that the purchase money for the lots involved—acquired in the manner it was—became the separate money of Mrs. Hawley, then the judgment was right. It will be observed by reference to §§ 2992 and 2993 of the Oregon statutes quoted above, and which were in force in Alaska when Mrs. Hawley was engaged in her enterprises there, that neither real nor personal property, acquired by a married woman during coverture by her own labor, shall be liable for the debts of her husband, but shall be absolutely her own, and subject to her disposal. Under the evidence and the findings, Mrs. Hawley agreed with Reasoner to work the lay above mentioned on shares. This she had a legal right to do, under the terms of § 2997, *supra*.

Appellant, however, insists that the proceeds of the lay work could not have become her separate property unless she had actually performed manual labor upon the claim. We do not think the words "by her own labor," used in § 2993, *supra*, were intended to be so restricted, but, as suggested by respondents' counsel, that they rather mean, by her own efforts. She deliberately agreed with Reasoner to work a lay, and to pay for the services of a man as a helper in her place. She was often upon the ground to see how the work progressed, and advised with Reasoner about it. The helper was paid from her share of the proceeds. We think, under such circumstances, that the

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money was acquired by her own exertions, and that, under the law, it became her separate money. The court in its findings traced that money to a subsequent investment, and found that it yielded yet more. The findings do not disclose the amount, but the evidence shows that her share of the proceeds of such investment in the Nome partnership enterprise was more than \$4,000, and that said sum was placed in the Seattle bank, and from it came the money which purchased the lots in question. Thus the money was acquired by Mrs. Hawley in Alaska under laws which made it her separate property, and when it was brought to Seattle it still remained such.

Appellant, however, insists that under *Board of Trade v. Hayden*, 4 Wash. 263, 30 Pac. 87; 32 Pac. 224, 31 Am. St. 919, 16 L. R. A. 530, the wife could not enter into a contract of partnership with her husband. It will be remembered that the husband and wife and one Mitchell composed the Nome partnership of Mitchell & Co. The rule discussed and decided in the case cited is for the protection of the wife's separate property, to prevent her from entering into such engagements with her husband that her separate property may be taken from her in satisfaction of his debts. The purpose of the rule is, not to work a loss to the wife, but to prevent it. In this instance money which went into the Nome enterprise was shown to be her separate money. It yielded a large percentage of increase. The wife was entitled to the legitimate increase upon the investment of her separate money. It is further urged that these funds have been commingled with those of the husband, and that, under *Yesler v. Hochstettler*, 4 Wash. 349, 30 Pac. 398, they are not separate funds of the wife. There has never been a commingling which leads to any confusion. The amount invested by each was a definite sum;

each sum yielded its definite increase, and the whole of each has at all times been easily ascertainable. This was not confusion, and the separate interests did not lose their identity as such.

The judgment is affirmed.

FULLERTON, C. J., and MOUNT, ANDERS, and DUNBAR, JJ., concur.

[No. 4997. Decided April 6, 1904.]

JOHN F. MILLER *et al.*, Appellants, v. PIERCE COUNTY
et al., Respondents.¹

HIGHWAYS—OBSTRUCTIONS BY ABUTTER TO GAIN ACCESS TO PREMISES—COMPLAINT TO ENJOIN REMOVAL—SUFFICIENCY. The owner of property abutting upon a public highway filled across tide lands, who has erected a building on his abutting property, flush with the street, and four feet higher than a bicycle path constructed on that side of the street, has no right to build a sidewalk from his property over said bicycle path, with inclines accommodating the use of the bicycle path to said sidewalk; since said sidewalk is clearly an unlawful obstruction to the free use of the path, the abutter's easement of access being a right which must be exercised so as to accommodate his property to the equal use of the street, which is under the exclusive control of the county commissioners; and a complaint to enjoin the commissioners from removing the obstruction is demurrable.

Appeal from a judgment of the superior court for Pierce county, Snell, J., entered November 5, 1903, dismissing the action upon sustaining a demurrer to the complaint. Affirmed.

John C. Stallcup and *J. W. A. Nichols*, for appellants.
F. Campbell and *C. O. Bates*, for respondents.

¹Reported in 76 Pac. 103.

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MOUNT, J.—This action was brought by the plaintiffs to restrain the defendants from removing an obstruction in a public highway. The lower court sustained a demurrer to the complaint. Plaintiffs elected to stand upon their complaint, and the action was dismissed. From this order they appeal.

The allegations of the complaint, omitting the formal parts, are as follows:

“(1) That the said Kandle, Winchester and Mead are now and for more than one-half year last past have been the acting and qualified commissioners of said county of Pierce; that said county is a duly organized county of said state. (2) That the said plaintiffs are now and for more than one year last past have been the owners seized and possessed of the lots numbered 21 and 22, in block numbered 7446 in the Indian Addition to the city of Tacoma. (3) That said addition is just outside of and adjoining the limits of the said city of Tacoma; that the said map or plat thereof was duly filed by the Puyallup Indian commissioners in the month of October, A. D. 1894, and then duly approved by the then county commissioners of the county of Pierce. That the said city of Tacoma has grown out to and over the said addition so that the same is now in all respects and all practical ways a part of the city of Tacoma, with like lots, streets and alleys and residence and business buildings thereon. (4) That plaintiffs' said lots are situated at the corner of Bay street and Q street, are each twenty-five feet in width and front on said Bay street, which street has been filled so as to make the middle fifty feet thereof about four feet higher than the land and lots on either side thereof—the said land thereabouts being level and overflowed by the rise of the tide from the water of Puget sound. (5) That a bicycle path has been constructed along and on the same side of said Bay street upon which plaintiffs' said lots are situated, close up to the line of his said lots, and at an elevation of about fifteen inches above the natural level or surface there, with a wide, deep ditch excavated along said Bay street between said

bicycle path and said elevated portion of said street. (6) That during the last past sixty days plaintiffs have erected a large building upon said two lots and built the same flush to the street line on said streets. That said building is just now completed, is two stories high and is constructed and arranged for a dwelling or lodging house, and two business rooms therein, one for a grocery and the other for a meat market, and fronting upon said Bay street. And in order to be up and out of the water and flow of the tide there, said building was constructed on an elevated foundation on a level with said Bay street as the same has been filled, and in front of their said building and over said bicycle path constructed a sidewalk of heavy planks, being about ten feet in width, and intend to cover said ditch with heavy planks out to said street, so that ingress and egress may be had to and from said building. That in order not to interfere with the use of the said bicycle path, plaintiffs have constructed an incline at each end of their said sidewalk, with safeguards at each side thereof in front of said sidewalk, so that the safety and enjoyment of said bicycle path is in no way impaired by said improvement. (7) That since the completion of said building and improvement, and after plaintiffs had rented said business rooms, and had mortgaged said premises for a loan of money, and before the said lessees had moved in and opened business, the said defendant commissioners have demanded of plaintiffs that they immediately remove said sidewalk, and upon failure so to do by plaintiffs, they will immediately cause the removal thereof by force. And so they threaten to do, and unless restrained will carry out their said threat; and they declare that they will allow nothing to be put upon or across said bicycle path or across said ditch so that plaintiffs may have access to their said property from said street. (8) Plaintiffs allege that if said sidewalk is removed it will destroy the use and value of their said building and leave it so that it will be unfit for occupancy for any purpose, and inaccessible from either of said public streets or at all, by reason of the said ditch and the tide water and other water there. (9) That plaintiffs are unable to protect their said property against the said

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threatened destruction thereof by said commissioners, except by the orders and decree of this court; that there is such an emergency pressing in the premises that speedy action is necessary to prevent irreparable injury. Wherefore, plaintiffs pray for a temporary restraining order enjoining said defendants from removing said improvements until the further order or final decree of this court; and that upon the final hearing hereof the said defendants be perpetually enjoined from interfering in any way with said sidewalk or improvements around said building; and for such other and further relief as may be equitable and just in the premises. And for their costs and disbursements herein."

The demurrer is to the effect that the complaint fails to state a cause of action; that it shows upon its face that plaintiffs are trespassing upon the public highway, and have erected a structure therein, which partially obstructs such highway. The complaint shows, that the plaintiffs' lots abut upon the highway; that they have erected a large building flush to the line of said street; that the top of the foundation of the said building is about four feet higher than the surface of the street adjoining said lots, but on a level with the graded center of the street; that they have erected a sidewalk about ten feet in width in said street, and intend to continue the same out to the graded portion of the street, and that this sidewalk is built over a bicycle path constructed along the side of the street.

It will be readily seen that this sidewalk is an obstruction to the free use of the street, especially that portion of the street set apart for the use of bicycles. No permission or authority is shown for the construction of this walk by appellants. By the statutes the respondents are given general supervision over the roads in their county. They are required to keep them clear from obstructions and in good repair. §§ 3767-3770, Bal. Code. Respondents also have

the right to set aside and reserve a part of any public highway for the exclusive use of bicycles and pedestrians, and it is made a misdemeanor for any person to trespass upon, or wilfully obstruct, or damage, any bicycle path. §§ 3887-8, Bal. Code. It is also a misdemeanor for any person to in any manner obstruct any highway. § 7293, Bal. Code. The respondents will certainly not be enjoined from removing, or threatening to remove, an obstruction upon a public street. No argument is necessary to demonstrate the correctness of this position. It is made plain by the statutes above referred to.

Appellants, however, insist that they have a right to access upon the street and to and from their property, and that this "easement of access" is a right which is so far recognized as private property that not even the legislature may take it away without compensation. This may be true as a general rule, but when it is said that this easement of access is recognized as private property it is not meant that the abutting property owner owns any part of the highway, or has any right other than the right to go and come freely from his property to and upon the street. One owner of property abutting upon the highway has the same rights as another. There can be no difference in this respect. All are equal. If appellants' position is correct—that they may accommodate the street to the convenient use of their building, which is four feet above the surface of the street—his neighbor on his right may accommodate the street to the convenient use of a building which may be eight feet above the street. His neighbor on his left may require an excavation extending ten feet or even half way across the street. His neighbors across the street, having the same rights, may require similar structures more or less obstructing the highway. When all have accommo-

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dated the street to the convenient use and occupation of their respective buildings, the highway may thereby become completely destroyed, both for the use of the general public and for those abutting thereon. This, of course, cannot be the rule; but it is the logical result of appellants' position. Under the statutes the respondents have entire control of the whole of the highway in question. Appellants simply own the right to go and come from their property upon the street. They must accommodate their property to the street lawfully constructed, and cannot be permitted to accommodate the street to the convenient use or occupation of their property without the permission of the proper authorities.

The judgment of the lower court was right, and is therefore affirmed.

FULLERTON, C. J., and HADLEY, DUNBAR, and ANDERS, JJ., concur.

[No. 4886. Decided April 6, 1904.]

THE STATE OF WASHINGTON, *Respondent*, v. EDWARD
RYAN, *Appellant*.¹

CRIMINAL LAW—FALSE PRETENSES—INFORMATION—SUFFICIENCY—STATING FACTS IN LANGUAGE OF STATUTE. In a prosecution for obtaining money by false pretenses, an information is sufficient where it sets out in the language of the statute that the defendant obtained from one H the sum of \$20, the property of H, by unlawfully, feloniously, etc., pretending to the agent of H that a certain paper, purporting to be a bank bill on a certain bank, was a good and valid bill of the value of \$20, whereas it was, as defendant well knew, a false token and was of no value, since a statement in the language of the statute defining the crime is sufficient where the statute states the facts so that the defendant may have notice of that with which he is charged; and it is not

¹Reported in 76 Pac. 90.

necessary to allege the means used or in what particulars the token was false.

SAME—DESCRIPTION OF BANK NOTE. The bank note is sufficiently described without setting it out *in haec verba*, where its nature, character, and contents are stated.

SAME—RELIANCE UPON FALSE PRETENSES. In such a case it is unnecessary to allege that the false pretenses were relied upon, where it is alleged that the property was obtained by means thereof.

SAME—ALLEGING VALUE OF MONEY. Nor is it necessary to allege the value of the twenty dollars.

CRIMINAL LAW—EXCESSIVE SENTENCE—NOT REVIEWED IN ABSENCE OF EVIDENCE. Where the evidence is not brought up, the court will not consider an objection that the sentence is excessive, although it appears that the jury recommended the defendant to the mercy of the court.

Appeal from a judgment of the superior court for King county, Rudkin, J., entered December 11, 1903, upon a trial and conviction of obtaining money by means of false pretenses. Affirmed.

Frank B. Wiestling, for appellant. There is no aider by verdict in a criminal case. *State v. Carey*, 4 Wash. 424, 30 Pac. 729; *State v. Feamster*, 12 Wash. 461, 41 Pac. 52; *Blanton v. State*, 1 Wash. 265, 24 Pac. 439. The offense must be sufficiently alleged. *United States v. Simmons*, 96 U. S. 360; *State v. Isensee*, 12 Wash. 254, 40 Pac. 985; *State v. Roberts*, 22 Wash. 1, 60 Pac. 65; *State v. Ackles*, 8 Wash. 462, 36 Pac. 597. It is necessary that the information contain an averment of the delivery or exchange, and that there was a connection between the false pretenses and the obtaining of the money. *Johnson v. State*, 11 Ind. 480; *State v. Orris*, 13 Ind. 569; *Jones v. State*, 50 Ind. 473; *Wagoner v. State*, 90 Ind. 504; *Lutton v. State*, 90 Tex. App. 518; *State v. Philbrick*, 31 Me. 401; *Commonwealth v. Strain*, 10 Met. 521; *Commonwealth v. Jeffries*, 7 Allen 548, 83 Am. Dec. 712; *State v. Anderson*, 47

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Iowa 142; *State v. Saunders*, 63 Mo. 482. The information should state in what particular the token was false. *State v. Dyer*, 41 Tex. 520; *Wills v. State*, 24 Tex. App. 400, 6 S. W. 316; *State v. Fleming*, 117 Mo. 377, 22 S. W. 1024; *Commonwealth v. Viser*, 24 Ky. Law 1161, 70 S. W. 832.

W. T. Scott, Chas. I. Gleason and D. C. Conover, for respondent.

ANDERS, J.—Upon the trial of an information, filed by the prosecuting attorney in the superior court of King county, the appellant was convicted of the offense of obtaining money by means of false pretenses. After the return of the verdict, appellant filed a motion in arrest of judgment, on the ground that the facts stated in the information did not constitute a crime or misdemeanor. This motion was denied and exception noted, and thereafter appellant was sentenced to the state penitentiary for a term of two and one-half years.

The information upon which the appellant was tried and convicted, omitting the formal parts, is as follows:

“He, the said Edward Ryan, in the county of King, state of Washington, on or about the 14th day of August, 1903, unlawfully, feloniously, falsely, fraudulently and designedly, and with intent to defraud one E. J. Hickey, did obtain from said E. J. Hickey the sum of twenty (\$20) dollars, the property of said E. J. Hickey, by then and there unlawfully, wilfully, feloniously, fraudulently and designedly pretending to one E. G. Hickey, the agent of said E. J. Hickey, that a certain paper, purporting to be a bank bill on the State Bank of New Brunswick, New Jersey, for the sum of twenty (\$20) dollars, was a good and valid bank bill, and of the value of twenty (\$20) dollars. Whereas, in truth and in fact, said paper was of no value whatsoever, and was a false token, as the said Edward Ryan well knew; that by means thereof said E. G.

Hickey paid to the said Edward Ryan the sum of twenty (\$20) dollars as aforesaid."

The statute specially applicable to this case and under which this information was drawn, reads as follows:

"If any person, with intent to defraud another, shall designedly, by color of any false token or writing, or any false pretense, obtain from any person any money, transfer, note, bond or receipt, or thing of value, such person shall, upon conviction thereof, be imprisoned in the penitentiary not more than five years nor less than one year, or imprisoned in the county jail for any length of time not exceeding one year." Bal. Code, § 7165; Pierce's Code, § 1662.

The first and principal question to be determined on this appeal is whether the information above quoted states facts sufficient to constitute the offense of which appellant was convicted. Our statute provides generally that the information must contain, (1) the title of the action, specifying the name of the court to which the information is presented, and the names of the parties, and (2) a statement of the acts constituting the offense, in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended (Bal. Code, § 6840), and that the information must be direct and certain as to the party charged, the crime charged, and the particular circumstances of the crime charged, when they are necessary to constitute a complete crime. Bal. Code, § 6842. And it is insisted by the learned counsel for the appellant that the information in question does not meet these requirements of the code.

The particular objections made to the information are, (1) that it contains no allegation of the means used by appellant in defrauding Hickey out of his money; (2)

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that no connection is shown in this information between the false pretenses alleged and the obtaining of the money; (3) that it does not state in what particular the token was false, and in what the invalidity consisted; (4) that it is insufficient in failing to describe fully the purported bank bill; (5) that it does not state that the pretenses alleged were relied on by Hickey; and (6) that it does not allege that Hickey parted with any money or anything else of value. While some, if not all, of these objections might be held valid under the strict rule of the common law applicable to such cases, we do not think they are tenable when tested by our own statutes relating to the forms of pleadings in criminal actions, and to the rules by which the sufficiency of such pleadings is to be determined. It will be observed that the acts constituting the offense charged in this information are stated in the language of the statute defining the crime of obtaining money, etc., by means of false pretenses, and it is the general rule that a charge so stated is sufficient. *Watts v. Territory*, 1 Wash. Ter. 409; *Schilling v. Territory*, 2 Wash. Ter. 283, 5 Pac. 926; *State v. Day*, 4 Wash. 104, 29 Pac. 984; *State v. Knowlton*, 11 Wash. 512, 518, 39 Pac. 966; *State v. Turner*, 10 Wash. 94, 38 Pac. 864.

This rule, however, is not applicable in all cases without exception, for, "if the statute does not sufficiently set out the facts which constitute the offense so that the defendant may have notice of that with which he is charged, then a more particular statement of the facts than is contained in the statute becomes necessary." 10 Enc. Plead. & Prac., 487. The validity of the statute upon which this information is based is not challenged by appellant's counsel in this case. He does not claim that the statute does not state the facts which constitute the offense, so that the accused

may know what he is required to answer. But he does insist in his argument that the information itself was so defective that it failed to apprise the appellant of the "nature and cause of the accusation against him." It is a well-settled rule in criminal prosecutions that the indictment or information must set forth all the facts which are necessary to constitute the crime charged, and which must be proved in order to convict the accused; and we are of the opinion that the information in question states all the facts necessary to constitute the offense, "in such manner as to enable a person of common understanding to know what is intended." It seems to us that it apprised the appellant of everything he was required to meet at the trial, and that he was not prejudiced in his defense by any of the alleged defects of the information.

In *State v. Bokien*, 14 Wash. 403, 44 Pac. 889, which was a prosecution for obtaining goods by false pretenses, under the statute here in question, it was insisted that the information was defective, in that it did not aver that the alleged false pretenses were made with a view to effect the sale of the goods, and that, by reason thereof, the party was induced to make the sale and part with his property. But this court held, after considering some of the authorities cited by appellant in the case at bar, that, although such allegations were not set out in direct and positive terms, they were necessarily implied from the language used, and that the objection to the information on the ground stated was not well taken. That case practically disposes of appellant's first, second, and fifth objections to this information, adversely to his contention, if anything more than a mere inspection of the information were necessary. The information, we think, sufficiently states in what particular the token was false and invalid, and sufficiently describes

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it to apprise appellant of what the state expected to prove in that regard. It was not necessary to set out the paper "purporting to be a bank bill," *in haec verba*. It was described in a manner that indicated its nature, character, and contents, though not in its own words, and therefore a more specific description was unnecessary. *State v. Wright*, 9 Wash. 96, 37 Pac. 313; *State v. Boon*, 49 N. C. 463.

As to the objection that the information does not state that the alleged pretenses were relied on by Hickey, it is sufficient to observe that, under statutes similar to ours, it has often been decided that such specific averment is unnecessary, if it be alleged in the information that the property was obtained by the defendant by means of the false pretense, with intent to defraud the owner. See, *State v. King*, 67 N. H. 219, 34 Atl. 461; *Norris v. State*, 25 Ohio St. 217, 18 Am. Rep. 291; *State v. McConkey*, 49 Iowa, 499; *State v. Hurst*, 11 W. Va. 54; 8 Enc. Plead. & Prac., 872; *State v. Bloodsworth*, 25 Ore. 83, 34 Pac. 1023. See, also, *State v. Bokien*, *supra*. And the recent case of *State v. Riddell*, 33 Wash. 324, 74 Pac. 477, is to the same effect. The appellant has cited several cases which, directly or indirectly, support his position upon the point now under consideration, but we believe the cases to which we have particularly referred announce a doctrine which is supported by the better reason, and more nearly accords with the spirit of our statutes. The doctrine of the above cases, briefly stated, is that that which is *necessarily implied* need not be specifically averred.

The next and last objection to the information is that it does not allege that Hickey parted with any money or anything else of value. It does state, as we have seen, that Hickey paid to Ryan (appellant) the sum of \$20. But appellant claims that it should have alleged that the \$20

was money and of some value. We think it would be difficult to define the meaning of the words "twenty dollars," if they do not mean that sum of money. Everybody in this country knows that the word dollar means a certain amount of money, and that a dollar is of some value. In *State v. Knowlton*, 11 Wash. 512, 39 Pac. 966, which was a prosecution for obtaining money under false pretenses, in which it was contended that the information failed to describe the money with sufficient accuracy, we said:

"We think the tendency of the more modern decisions is to dispense with the rule requiring the kind, character or denomination of the money obtained to be set out, and that this best accords with the spirit of our code of criminal procedure."

There, it is true, the money obtained was described as being "five thousand dollars in money of the value of five thousand dollars in lawful money," but we think the information would not have been bad if the value of the money had not been stated. In *People v. Millan*, 106 Cal. 320, 39 Pac. 605, it was held that an information which charges the accused with obtaining money by fraud, but fails to allege the value of the money obtained, is good. And in *Oliver v. State*, 37 Ala. 134, it was ruled that an indictment alleging that, by means of the false pretense charged, the defendant obtained "sixty-five dollars in money," was sufficiently definite and certain, without an additional averment of the value of the money. In *State v. Wilkerson*, 98 N. C. 696, 3 S. E. 683, the defendant was indicted for obtaining, by means of a certain false pretense, an order from the commissioners for the payment of money on account of the support of a pauper, and the court held that the description of the property obtained, as "an order for the sum of six dollars, issued for the support of S.," was

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sufficient. It will be noticed, that, in the case last cited, the "six dollars" was neither alleged to be money, nor of the value of six dollars in money. And it seems to us that the ruling of the court in that regard was certainly correct, as well as reasonable. Mere technical defects in criminal pleadings, which do not go to the substance of the accusation, and do not prejudicially affect any substantial right of the defendant, are not regarded in this state in the administration of the criminal laws.

We have thus discussed, somewhat at length, the various points made by counsel for appellant in the able brief which he has filed herein, in order to show more clearly than it would otherwise have appeared, why we consider this information sufficient. While the information is not as formal in some particulars as it might have been, yet we are clearly of the opinion, as we have hereinbefore stated, that it states facts sufficient to constitute an offense under the statute, and it therefore follows that the trial court did not err in denying appellant's motion in arrest of judgment.

At the time the jury returned their verdict in this action, they recommended the appellant to the mercy of the court, and his counsel earnestly insists that the sentence of two and one-half years is excessive, and should be modified by this court, in conformity with the verdict of the jury. This cause was brought here upon a short record, and the evidence adduced at the trial is not before us. We are therefore unable to say that the evidence in the case did not justify the sentence imposed by the learned trial judge.

The judgment is affirmed.

FULLERTON, C. J., and DUNBAR, MOUNT, and HADLEY, JJ., concur.

[No. 4760. Decided April 6, 1904.]

LAURA A. BOND, *Respondent*, v. THOMAS CHAPMAN,
Appellant.¹

LANDLORD AND TENANT—NOTICE TO QUIT—SUFFICIENCY. A notice to quit is not objectionable as not signed by the owner, where it appears that the notice was prepared by a clerk of the authorized agents, who submitted it to the agents, and signed the agents' and owner's names by authority of the agents, since the material thing is the giving of the notice.

UNLAWFUL DETAINER—AFFIRMATIVE DEFENSE OF AGREEMENT TO CONVEY—MATTERS ALREADY LITIGATED—EQUITABLE DEFENSES INADMISSIBLE. In an action of unlawful detainer brought against a tenant in possession holding over after notice to quit, an affirmative defense, which sets up an agreement to convey the premises to the defendant, with the right of possession until conveyance is made, is properly excluded where it appears that the matters involved had already been litigated and decided adversely to defendant; and also, because it is an equitable defense, which can not be interposed in an action of unlawful detainer.

SAME—DOUBLE DAMAGES. In an action of unlawful detainer, Bal. Code, § 5542, authorizes the entry of judgment for double damages where the unlawful detainer is made after default in the payment of rent.

Appeal from a judgment of the superior court for King county, Griffin, J., entered March 18, 1903, upon the verdict of a jury in favor of the plaintiff, in an action of unlawful detainer. Affirmed.

Piles, Donworth & Howe and *Elmer E. Todd*, for appellant.

Bausman & Kelleher, for respondent.

DUNBAR, J.—This is an action of unlawful detainer, brought by respondent against appellant on the 29th day of April, 1902, to recover possession of certain farming

¹Reported in 76 Pac. 97.

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lands in King county. In her complaint respondent alleged the execution of a one-year lease of said premises to J. W. Marshall, on March 25, 1901, and the assignment of said lease to appellant on the 9th day of April, 1902. In said lease it was provided that, after the expiration of the year, the tenancy should be construed as a month to month tenancy, if the lessor remained in possession. The complaint alleged the service of a notice to quit on appellant on March 29, 1902, and the wrongful possession since by appellant. The answer denied due service of the notice to quit, admitted that appellant was in possession after the expiration of the lease, but denied that his possession was wrongful, setting up three affirmative defenses. A demurrer was interposed and overruled as to the first affirmative defense, and sustained as to the second and third. The first affirmative defense, which is in question here, alleges, that in May, 1901, while appellant was in possession of said premises under said lease, respondent executed a written memorandum of agreement by which she agreed to convey said premises to him, and that it was expressly agreed that appellant should remain in possession of the land until the agreement was carried out; that respondent refused to carry out the agreement to convey. The respondent in reply denies the material allegations of this affirmative defense, and pleads, affirmatively, that the appellant had brought an action in the superior court of King county on the affirmative defense pleaded; that the issues had been tried out, and judgment thereon was rendered in favor of the respondent.

At the close of respondent's case, appellant asked for a nonsuit because there was no proof of service of notice, which motion was denied. Respondent objected to the introduction of any testimony under the allegations of the

first affirmative defense, which objection was sustained. No further testimony being offered by appellant, upon respondent's motion, the court instructed the jury to return a verdict for respondent for restitution of the premises and damages to date at the rate of \$200 per year. The jury returned a verdict for the sum of \$194. Motion for new trial was denied, and judgment was entered up for double damages, amounting to \$388, from which judgment this appeal was taken.

It is assigned that the court erred, (1) in admitting in evidence the alleged notice to quit; (2) in denying defendant's motion for a nonsuit; (3) in sustaining plaintiff's objection to the introduction of any proof under the first affirmative defense; (4) in instructing the jury to find a verdict in favor of plaintiff; and (5) in entering up judgment for double damages.

Assignments 1 and 2 are based upon the theory that the notice to quit in this case was not signed by plaintiff, or by Messrs. Bausman & Kelleher, her attorneys, admitted to have authority to sign such notice. The notice was signed, "Laura A. Bond, owner, by Bausman & Kelleher, her attorneys and agents." The testimony, however, shows that this notice was prepared by Mr. Burns, a clerk in the office of Bausman & Kelleher, who testifies that he was authorized to sign the notice, as it was signed, by Mr. Kelleher, a member of the firm; that Kelleher instructed him to sign the notice, "Laura A. Bond, owner, by Bausman and Kelleher, her attorneys and agents;" and that, after it was so signed by him, he showed it to Mr. Kelleher, who approved the signing. We think there is nothing in the contention that this notice was not signed by the respondent or by her agents. It would have been perfectly competent for Mr. Kelleher, or any member of the firm,

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to have dictated the notice, signatures and all. The material thing is the giving of the notice.

Neither did the court err in sustaining respondent's objection to the introduction of any proof under the first affirmative defense, for two reasons: (1) it clearly appears, although not strictly proven, that the matters involved in this defense had been already litigated; and (2) it is an equitable defense to an action for forcible detainer, and it is not competent to interpose equitable defenses to such actions. *Phillips v. Port Townsend Lodge*, 8 Wash. 529, 36 Pac. 476; *Gore v. Altice*, 33 Wash. 335, 74 Pac. 556; *Morris v. Healy Lumber Co.*, 33 Wash. 451, 74 Pac. 662. It is insisted by the appellant that this is not an equitable defense, but it seems to us that it is clearly so; that, if appellant had any remedy against respondent, it would have to be sought through the medium of an action for specific performance of the contract. Indeed, this is the action which was resorted to in this case, and which was determined against the appellant.

The only remaining question is whether or not the court erred in entering up the judgment for double damages. Section 5542, Bal. Code, which prescribes the procedure under the forcible detainer act, provides, among other things, that,

"The jury, or the court if the proceeding be tried without a jury, shall also assess the damages occasioned to the plaintiff by any forcible entry, or by any forcible or unlawful detainer, alleged in the complaint and proved on the trial, and if the unlawful detainer be after default in the payment of rent, find the amount of any rent due, and the judgment shall be rendered against the defendant guilty of the forcible entry, forcible detainer, or unlawful detainer for twice the amount of damages thus assessed and of the rent, if any, found due."

It seems to us that the statute is not susceptible of construction.

There seems to be no merit in this appeal in any particular, and the judgment is affirmed.

FULLERTON, C. J., and ANDERS, HADLEY, and MOUNT, JJ., concur.

34	610
36	420
34	610
37	608

[No. 5082. Decided April 6, 1904.]

ÆTNA INSURANCE COMPANY, *Appellant*, v. ROBERT G. THOMPSON *et al.*, *Respondents*.¹

APPEAL — PARTIES — SURETIES ON COST BOND — ENTRY OF JUDGMENT AGAINST SURETIES. Where upon a dismissal of an action judgment is rendered against the plaintiff and his sureties upon the cost bond, and plaintiff appeals, the sureties are necessary parties to the appeal, upon whom notice of appeal must be served where they do not join as appellants, although the judgment against the sureties was void for want of jurisdiction, and the lower court attempted to vacate it after the appeal was perfected.

APPEAL — EFFECT OF, ON JURISDICTION OF LOWER COURT — JUDGMENTS — VACATION AFTER APPEAL PERFECTED. After an appeal is perfected, the jurisdiction of the lower court is at an end, and it has no power to vacate the judgment as to appellant's sureties on the cost bond, inadvertently entered against the sureties without notice, although the judgment was void for want of jurisdiction, since the supreme court has exclusive jurisdiction of the case.

JUDGMENTS — VACATION — NUNC PRO TUNC ENTRY. An order vacating a judgment for inadvertence and want of jurisdiction can not be regarded as a *nunc pro tunc* entry of a judgment, when it does not appear what judgment the court intended to make.

Appeal from a judgment of the superior court for King county, Morris, J., entered December 12, 1903, in favor

¹Reported in 76 Pac. 105.

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Opinion Per DUNBAR, J.

of defendants after a trial on the merits, dismissing the action at plaintiff's cost. Appeal dismissed.

Carr & Preston, for appellant.

Byers & Byers, for respondent.

DUNBAR, J.—This case was brought by the plaintiff in the court below to recover from defendants money paid to them upon a fire insurance policy, which payment it was alleged was induced by fraudulent representations made by defendant Thompson. After a trial on the merits, judgment was rendered against the plaintiff, and John Davis and F. K. Struve, sureties on a cost bond filed by the plaintiff, for the costs of the action to be taxed. Judgment was obtained by defendants, which judgment was appealed from, and the respondents move to dismiss this appeal, for the reasons that the sureties on the cost bond did not join in the appeal, and were not served with notice of the appeal.

We decided, in *O'Connor v. Lighthizer*, ante, p. 152, 75 Pac. 643, that, where judgment was entered against the sureties on the cost bond, in order to make the appeal effectual, said sureties should either be served with notice of the appeal or join in said appeal. It is, however, contended by the appellant that this case is removed from the operation of the rule therein announced by the fact that, after the appeal had been taken, the court, upon motion of the sureties, vacated the judgment against said sureties, for the reason that the same had been entered without authority of law, without jurisdiction by the court, and by an inadvertence of the court.

Affidavits in support of the motion to vacate were filed by the sureties, and by E. M. Carr, one of the attorneys for the appellant herein. The affidavit of surety Struve

does not seem to be pertinent to the discussion of this motion to dismiss. The substance of it is that neither he nor his co-surety knew of the rendition of the judgment against them until a long time after the same was rendered, with the assertion that it was irregularly obtained. There is a further allegation in the affidavit that it was obtained by fraud practiced upon the sureties, but it is a bare allegation without any statement of the matters constituting fraud. The fact that the sureties did not know that a judgment was entered against them is not important. The attorney Carr testified, in substance, that he did not know that a cost bond had been given by the plaintiff; that, when a copy of the form of judgment was handed to him, he did not read the same further than to see that it was in form a final judgment in favor of the plaintiff, and for costs; and that he did not discover that the judgment had gone against the sureties until some time afterwards. The affidavit it seems to us is not pertinent.

The court vacated the judgment against the sureties, setting forth in its order the reasons for the same, which are to the effect, that the sureties had never had legal notice of the pendency of the action; that they never, in any wise, appeared in the action; that the court had never had any jurisdiction whatsoever over the persons of the sureties, and that the court was wholly and entirely without jurisdiction, to direct or render any judgment of any kind whatsoever in the action against the sureties; that the signing of the judgment entry by the court was absolutely and entirely without jurisdiction, and said judgment was obtained irregularly by the defendants in said action, and by surprise upon the plaintiff in the action, and upon the sureties and upon the court, and that the court signed said judgment inadvertently and unknowingly; and that

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said judgment against said sureties is, and at all times since its signing by the court has been, absolutely null and void. There is no finding by the court that the judgment was obtained by fraud, or that the court was in any manner imposed upon by the plaintiff's or defendant's attorneys, and it may be very well concluded that the inadvertence referred to by the court was an inadvertence in the construction of the law governing such cases.

Courts are presumed to have knowledge of the judgments which they solemnly decree and order entered upon their records, and, while there was probably sufficient showing made to have authorized the court to vacate the judgment before the appeal was perfected, when the appeal was perfected the jurisdiction of the trial court was ended, and any remedy which was sought to be obtained must necessarily be obtained in the appellate court, which had obtained jurisdiction by the appeal. It is evident that jurisdiction of the case should not rest in the two different courts at the same time. There is not enough in the statement of the court to show that this second entry was a *nunc pro tunc* entry of a judgment, or the entry of a judgment which the court intended to make; for, while the court says that it made the order which it did make inadvertently, it does not say what judgment it would have rendered in the premises in lieu of the one which it did render. It is no answer to the motion to dismiss in this case to say that the judgment entered against the sureties was without jurisdiction, and absolutely void; for, according to the decision in *O'Connor v. Lighthizer, supra*, the motion to dismiss an appeal will be granted where judgment was rendered against the sureties, even though the judgment was without jurisdiction and absolutely void, for the reason, as stated in that opinion, that one has a right to appeal from a void judg-

ment. This motion to vacate was evidently an afterthought on the part of the appellant, for the purpose of escaping the rule laid down in *O'Connor v. Lighthizer*. But we think it would lead to confusion, and a conflict of jurisdiction, to permit a trial court to in any way interfere with the jurisdiction of this court, or with the judgment of its own court, after such judgment had been brought to this court by the perfection of an appeal.

In *State ex rel. Mullen v. Superior Court*, 15 Wash. 376, 46 Pac. 402, this court said, in speaking of this question:

"When the appeal was perfected the superior court had no jurisdiction to take any action in the proceeding except those specially provided for in the act relating to appeals, and the making of the threatened order was not included among those there provided for. Hence the superior court was without jurisdiction to make such order; and if the defendant was entitled to any relief, such relief could only be afforded him in this court, which alone had general jurisdiction of the proceedings after the appeal had been perfected."

The question involved there was the possession of an office. In *Canada Settlers L. & T. Co. v. Murray*, 20 Wash. 656, 56 Pac. 368, it was said:

"It is insisted, however, that the controversies between the parties and the rights involved in this appeal have ceased to exist, because the respondent moved the court to vacate the judgment. The motion to vacate the judgment, however, does not go far enough to relieve the appellants; for, after the vacation of a judgment, the default of the defendants would still remain, and this of course could not be adjudged until after the disposal of the demurrer before mentioned. And, again, the motion to vacate the judgment was not made until after the statement of facts had been prepared and settled and the appeal in all things had been consummated. The case had then been removed to the jurisdiction of this court, and it was too late for

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the respondent to cure the errors by moving to vacate the judgment."

It is the universal doctrine that an appeal deprives the lower court of jurisdiction, and lodges it exclusively in the appellate court.

"The perfecting of an appeal has the effect to deprive the lower court of jurisdiction to do anything not pertaining to the enforcement of the judgment or order which would tend to render the appeal abortive or defeat its purpose." 2 Spelling, New Trial & Practice, § 559.

In *Shay v. The Chicago Clock Co.*, 111 Cal. 549, 44 Pac. 237, it was decided that, pending an appeal from a judgment, the court in which the judgment was entered had no power to amend or correct it. It was conceded that the judgment there was entered by the clerk without any authority, but the appellate court said:

"A motion was made, upon suggesting a diminution of the record, to file as a part of the record on the appeal a document purporting to be a judgment entered in the cause September 27, 1895, *nunc pro tunc* as of June 5, 1895, but as the appeal from the original judgment was made June 19th, the judgment was thereby removed from the superior court, and, while an appeal from a judgment is pending, that court has no power to amend or correct its judgment."

In this case the attempt to vacate the judgment against the sureties, which was in effect an amendment of the judgment, was not made until after the appeal had been perfected in this court. In *Stewart v. Taylor*, 68 Cal. 5, 8 Pac. 605, the same rule was announced, where the court had denied the motion for a new trial, and afterwards vacated and set aside the order. The court said:

"This order purports to have been made on the 12th of November, 1881. But the defendant had appealed from the order on the 30th of June, 1881, and when the order

of the 12th of November was made and entered, the case was pending in this court. There is no doubt that the court in which an irregular order is made and entered may, where the irregularity is apparent on suggestion, motion or *ex mere motu*, set it aside at any time before an appeal is taken from it. Such an order, however, is valid until set aside or reversed on appeal; and where an appeal has been taken from it, the jurisdiction of the court *a qua* is suspended, so that pending the appeal the court below cannot vacate and set aside the order appealed from."

In *Clarke v. Manchester*, 56 N. H. 502, it was said:

" . . . it has been held, that, after an appeal from the state circuit court has been taken and allowed, the court ceases to have any jurisdiction in the cause, and thereafter the record cannot be changed by either party; nor can an entry be filed *nunc pro tunc*,"

citing *Stewart v. Stringer*, 41 Mo. 401, 97 Am. Dec. 278. In fact, this is the well adjudicated rule, founded on reason and necessity.

We think there is nothing shown in the record which removes this case from the operation of the rule announced in *O'Connor v. Lighthizer*, *supra*, and the appeal will therefore be dismissed.

ANDERS, HADLEY, and MOUNT, JJ., concur.

[No. 4827. Decided April 8, 1904.]

FRANK I. ANDERSON, *Respondent*, v. NEW YORK LIFE INSURANCE COMPANY, *Appellant*.¹

INSURANCE—RECOVERY OF PREMIUM PAID UNDER FALSE REPRESENTATIONS—PLEADING AND PROOF—VARIANCE. In an action against an insurance company brought to recover the amount paid as a premium upon a life insurance policy, in which the complaint alleges that the same was obtained through the false

¹Reported in 76 Pac. 109.

April 1904]

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and fraudulent representations of the defendant's agent, wherein the defendant agreed to issue a policy authorizing a certain loan after the payment of two annual premiums, it is not a variance to receive evidence that portions of a sample policy containing no such agreement were read to the plaintiff by the agent, who explained or construed a certain clause thereof to authorize the loan as represented.

TRIAL—OBJECTIONS TO EVIDENCE—REVIEW ON APPEAL. An objection to evidence that it is not relevant and material is insufficient to raise the point that it varies the terms of a written contract, and the supreme court will not consider objections to the evidence unless the precise point is raised below.

ESTOPPEL—PLEADING—FACTS SUFFICIENT WITHOUT CONCLUSION. While an estoppel must be pleaded, it is sufficient to allege the facts from which the estoppel arises, without alleging the conclusion that the party is estopped.

Appeal from a judgment of the superior court for Snohomish county, Denney, J., entered March 18, 1903, upon findings in favor of the plaintiff, after a trial on the merits before the court, a jury being waived. Affirmed.

Granger & Heifner, for appellant.

Shank & Smith, for respondent.

DUNBAR, J.—This is an action brought by the respondent to recover from the appellant a certain premium upon a policy of life insurance, which premium was paid by the respondent to the appellant. The amended complaint alleges, that the defendant, by its duly authorized agent, solicited the plaintiff to buy life insurance in the said defendant company, and, to induce plaintiff to do so, then and there stated and represented that, for an annual premium of \$251.40, to be paid in advance, the company would issue a policy upon the plaintiff's life, under which policy the plaintiff could borrow—assigning the policy as security—the sum of \$490, upon the payment of two annual premiums; and that the agent further stated and

promised that, if the policy when issued should not be as represented, plaintiff might, at his option, return the policy, and the premium paid would thereupon be refunded; that the plaintiff, relying upon the said representations, and believing the same to be true, and being induced thereby and not otherwise, agreed with the defendant, through its said agent, for such insurance, in the amount of \$5,000 accordingly, and thereupon, at the request of the said agent, paid to the defendant, through him, the sum of \$251.40, as the first annual premium; that thereafter the defendant issued and tendered to the plaintiff by mail, as a compliance with the agreement made through its said agent, a policy upon which the defendant could not loan any sum whatever until three annual premiums had been paid, and under which at all times the plaintiff's net outlay, over and above any loan obtainable by him thereon from the defendant company, would be many times greater than that represented and stated to the plaintiff by the defendant, through its said agent; that the plaintiff believed, and alleged the fact to be, that the policy tendered to him was that referred to and contemplated by the defendant, acting through its said agent, in its said statements and representations to the plaintiff; but that the said policy did not accord with the said statements and representations; and, further, that the said statements and representations were false, and were wilfully, knowingly, and fraudulently made with intent to deceive and mislead the plaintiff; that, upon the receipt of the policy tendered, the plaintiff was informed by the defendant that the defendant would not make any loan upon his policy until three annual premiums had been paid, and the plaintiff forthwith declined to accept the policy offered to him, and promptly returned the same.

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unaccepted, to the defendant, at its home office, and notified the defendant of his refusal to accept the same, and then and there demanded of the defendant repayment of the sum of \$251.40, paid by him as aforesaid, but that the defendant failed and refused to pay the said sum, or any part thereof. Judgment was demanded for the sum of \$251.40.

The answer denied that the defendant stated and represented that it would issue to plaintiff a policy upon which the plaintiff could borrow the sum of \$490, or any other sum, upon the payment of two annual premiums; denied that it had made any agreement with the plaintiff, except that contained in the application and policy; and alleged affirmatively the application, issuance and delivery of the policy, that the agent, when soliciting said application from the plaintiff, showed and handed to the plaintiff a true and correct sample policy, such as is described in the plaintiff's application, that said sample policy was examined and read by the plaintiff before he executed said application, and that the policy, so delivered by the defendant to the plaintiff, was executed in accordance with the terms and provisions contained in said sample copy. The reply denies the reading of the sample copy, but admits that what was stated by the agent to be a sample copy of the policy was exhibited to him by the agent, and considerable parts of the policy were read to him by said agent.

A jury was waived, and the cause was tried by the court. The court found that the soliciting agent, for the purpose of inducing the plaintiff to take the insurance, represented to him that, for an annual premium of \$251.40, to be paid in advance, the company would issue a policy on the plaintiff's life in the sum of \$5,000, un-

der which policy the plaintiff could borrow—assigning the policy as security—the sum of \$490, upon the payment of two annual premiums in the second part; and that the agent further stated and promised to plaintiff that, if the policy when issued should not be as represented, the plaintiff might, at his option, return the policy, and the premium paid thereupon would be refunded; that the plaintiff relied upon and believed these statements and representations, and was thereby induced to, and did, make application, as solicited by said agent, and, at his request, paid to the defendant, through him, the sum of \$251.40, as a first annual premium; that thereafter the company sent the policy to the plaintiff, under which policy the defendant would not loan the sum of \$490, or any sum whatever, until three annual premiums had been paid; and the court found that the provision in the policy in regard to the payment was uncertain in meaning and open, especially upon casual reading or hearing by one not experienced in life insurance—as the plaintiff was not—to the construction given by the agent to the plaintiff; that the statements and representations made by the agent were made deliberately, and either falsely and fraudulently with intent to deceive the plaintiff, or else with a reckless disregard of truth and fact, which the agent, as such, was bound to know, and to have known; that, upon the receipt of the policy, when it was ascertained by the defendant that the policy was not such a policy as he had contracted for, he, in prompt course, returned it unaccepted to the defendant, at its home office, accompanied by a written notification of his refusal to accept the policy, and by a written demand for the payment of the sum of \$251.40; that the defendant received and retained the policy, and has never returned

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or offered to return it to the defendant, and has failed and refused to repay the plaintiff the sum of \$251.40, or any sum whatever.

From such facts the court concludes that the defendant was bound and concluded, under the circumstances of this case, by the construction given to the defendant's policy by its agent, and by the plaintiff in turn; that, in consequence, it was the defendant's legal duty, either to carry out the contract as thus construed, or, upon its refusal to do so, to comply with the plaintiff's demand for the payment of the premium made by him; that the defendant was concluded from claiming its policy was in force by receiving back the policy, when refused and surrendered by the plaintiff, without effort to return the policy, or any action equivalent thereto; that, in consequence, the plaintiff was entitled to judgment against the defendant for the sum of \$251.40, with interest from the date of its payment to defendant, and for its costs and disbursements. Judgment was entered accordingly, and an appeal was prosecuted.

It is contended by the appellant that the court erred in permitting the respondent to testify as to what the agent said in explanation of the meaning of the loan clause, printed in the policy; that this testimony was inadmissible, for the reason that it was entirely irrelevant and immaterial, because there is no allegation of any kind or character in the complaint to the effect that the agent misrepresented or misstated the meaning of any clause in the sample policy, and that the testimony was therefore entirely at variance with the allegations of the pleadings; that it was inadmissible for the further reason that the agent was a mere soliciting agent, and was without authority to place a legal construction upon the language

of the policy; the main contention being, that the complaint sets out a cause of action upon a contract, while the evidence fails to show the contract alleged; that the pleadings charged that the insurance company, through its agent, promised and agreed to execute and deliver to the respondent a policy which should provide in its terms that, after the payment of two annual premiums, the assured might borrow the sum of \$490 upon the security of the policy alone, while the respondent's testimony—conceding it to be true—shows that the agent showed and correctly read to the respondent a true and correct sample policy, and, in construing it, stated to the applicant that the language in the policy meant that the assured might, after the payment of two annual premiums, borrow \$490 upon the security of the policy alone; that this is an action upon a contract to deliver a policy containing a certain provision, whereas the proof of the plaintiff—conceding it to be true—shows that the policy which the company delivered was precisely the same as the sample policy which was read and shown to the applicant, and that, if any wrong was done him, it was by the false and fraudulent expression of an opinion by the agent as to the meaning of a clause contained in the policy; that, if the respondent is, in any action, entitled to recover from the appellant, it must be upon the theory that appellant's agent expressed to the applicant a false opinion as to the meaning of the policy; that there is not in the pleadings a suggestion as to any false expression of opinion by the agent, nor that the agent made any expression of opinion; that, therefore, the complaint alleges one state of facts, to wit, a promise and agreement, on the part of the agent, to deliver a policy containing such provision, while the testimony shows a different state of facts.

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It seems to us that this criticism of the complaint is not justified by the language of the complaint itself. The complaint alleges, in terms, that the statements and representations made by the agent were false, and wilfully, knowingly, and fraudulently made with intent to deceive and mislead the plaintiff; and that the policy tendered to him did not accord with the said statements and representations. This issue was met squarely by paragraph 2 of the answer, where it denies that the defendant stated and represented that it would issue to the plaintiff a policy upon which the plaintiff could borrow the sum of \$490, or any other sum, upon the payment of two annual premiums, and denies that the defendant made any agreement with the plaintiff, except that contained in the application and policy thereafter referred to. So that the issues made by the pleadings were the issues tried in the cause, and the testimony adduced follows closely the allegations of the complaint.

The testimony is brief and conflicting, and from its perusal we are not inclined to disturb the findings of fact made by the trial court. As to the objection that the court erred in permitting respondent to testify as to what the agent said in explanation of the meaning of the loan clause entered in the policy, while we are not prepared, by any means, to say that the testimony would not have been admissible under any circumstances, the record in this case shows that no proper objection was made to its introduction. This testimony was certainly relevant and material to the main issue in the case. The only objection to its admission that could have been urged, if any, was on the ground of a variance of the terms of a written contract; it nowhere appears that the court's attention was called to an objection for this reason, and it is due the

trial court that its attention should be called to the specific reasons upon which the challenge is based. The objection should always state the grounds thereof, and should present to the court the precise point relied on by the party objecting. In the language of some of the decisions, the party must lay his finger upon the point of objection. 8 Enc. of Plead. & Prac., p. 23. The appellate court, in examining the question as to whether a ruling of the court below on an objection to evidence was correct or not, will not consider any other grounds of objection to the evidence than those urged in the court below. *Id.*, p. 223. And this has been the universal rule announced by this court. When the objections to the introduction of evidence are not definite enough to call the court's attention to the real ground of inadmissibility, the error cannot be urged on appeal. *Coleman v. Montgomery*, 19 Wash. 610, 53 Pac. 1102. An objection that transactions and conversations between husband and wife were inadmissible in evidence, on the ground of being incompetent, irrelevant, and immaterial, is insufficient to afford ground on appeal to urge the specific objection that the matters testified to were inadmissible as being privileged communications, which one spouse is forbidden to divulge without the consent of the other. *Sackman v. Thomas*, 24 Wash. 660, 64 Pac. 819.

The assignments in appellant's brief are somewhat involved, and several assignments are discussed under one head, so that it is a little difficult to answer them *seriatim*. But the two assignments which we have noticed constitute the main contention in appellant's brief—outside of the assignment that the findings of fact are not warranted by the evidence, which we have before mentioned. It is also contended by the appellant that, because the court

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Syllabus.

found that the appellant received and retained the policy and never returned it or offered to return it, such was, in effect, a finding upon which the court based an estoppel in its third conclusion of law; and it is objected that it is an elementary proposition of pleading that an estoppel must be pleaded, and that there is no suggestion, either in the complaint or in the reply, of any facts indicating the intention of the pleader to set up an estoppel. We think that this finding of the court was immaterial, under all the circumstances of the case, and that the judgment of the court would have been warranted in the absence of such finding. But, in addition to this, we think that, while it is no doubt true that an estoppel should be pleaded, the facts pleaded were sufficient to warrant the court in declaring an estoppel. It is not necessary for the complaint to allege the conclusion that defendant is estopped, if the acts constituting the estoppel are pleaded.

We think no error was committed by the court in the admission of testimony, in the findings of fact, or conclusions of law, and the judgment is therefore affirmed.

FULLERTON, C. J., and HADLEY, ANDERS, and MOUNT, JJ., concur.

[No. 4930. Decided April 8, 1904.]

WASHINGTON TIMBER & LOAN COMPANY, *Appellant*, v.
E. M. SMITH, *et al.*, *Respondents*.¹

TAXATION—ACTION TO FORECLOSE COUNTY DELINQUENCY CERTIFICATES—DESCRIPTION OF TRACTS—SUFFICIENCY. In an action to foreclose the county's lien for taxes under delinquency certificates, capital letters and figures standing alone may be used to describe the tracts, where they are abbreviations commonly understood in their relations to each other in the description of

¹Reported in 76 Pac. 267.

34	625
35	274
34	625
38	13
38	14
38	506
38	605
34	625
40	268
34	625
41	133

lands, in view of Bal. Code, § 1748, providing that letters and figures standing alone may be used to describe the tracts.

SAME—VARIANCE. The use of the fractional " $\frac{1}{4}$ " in the summons is not a variance from the figure "4" in its algebraic exponent position elsewhere used in the proceedings to indicate subdivisions of a section, since both commonly indicate the same thing in descriptions.

SAME—JUDGMENT—CERTAINTY—AMOUNT INDICATED BY POSITION OF FIGURES IN COLUMNS. In a general proceeding to foreclose county delinquency tax certificates, the amount of the judgments may be shown by columns of figures, and a line drawn through the column may take the place of the decimal point, when the context shows that was the intention; and a tax lien judgment against many tracts of lands, in which the description of the tracts appears in one column, the amounts of the delinquent certificates in another, the 15 per cent interest in another, and the total amount of the judgments in another column, sufficiently designates the amounts of the judgments against the respective tracts of land in the corresponding or opposite columns.

SAME—TAX CERTIFICATES—DATE OF ISSUANCE—SIGNATURE OF OFFICER—ACTION WHEN NOT PREMATURE. Where the county treasurer prepared certificate of delinquency books, computing interest to January 31, 1898, which were kept in his office and intended as certificates of delinquency as of that date, but which were not signed by him, and his successor in office, upon foreclosure on behalf of the county, adopted the certificates without computing the interest, making copies thereof, which he signed and filed in the clerk's office in May, 1901, the certificates for all essential purposes were issued at the time of their preparation, January 31, 1898, as the signature of the officer was not essential to the lien held by the county; and hence the law of 1901, p. 385, § 3, prohibiting the bringing of suit at the time upon certificates thereafter issued, has no application.

SAME—DATE OF FILING CERTIFICATES—NUNC PRO TUNC ORDER CHANGING DATE—ESTOPPEL BY FAILING TO OBJECT BELOW. Where in a tax foreclosure the court had jurisdiction of the cause, and by a *nunc pro tunc* order the filing mark on the certificates was changed from June 10, 1901, to May 9, 1901, which latter date was fifteen days before the first publication of the summons as required by the law, an objection that the certificates were not filed in time relates to a mere irregularity, and must be raised in the court below or the party is estopped under the provisions of Bal. Code, § 1767.

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SAME — ESTOPPEL OF OWNERS — NOTICE BY PUBLICATION — TAX FORECLOSURE A PROCEEDING IN REM. Under Laws 1901, p. 385, § 3, property owners are required to take notice of tax foreclosure proceedings, although the notice is only by publication, and if the owner does not appear he is estopped by the judgment from raising any questions as to the regularity of the same, since the proceeding is *in rem* and not *in personam*.

SAME — NOTICE OF RECEIPT OF BOOKS — FAILURE OF RECORD TO SHOW PUBLICATION. The failure of the record to show that the treasurer published notice of the receipt of the tax books, as required by Laws 1893, p. 353, § 70, does not invalidate a tax foreclosure, where it is not alleged that such notice was not in fact given, but only that no record thereof exists, as the absence of the record would be a mere irregularity.

Appeal from a judgment of the superior court for Snohomish county, Denney, J., entered August 29, 1903, dismissing an action to cancel a tax deed, upon sustaining a demurrer to the complaint. Affirmed.

Sherwood & Mansfield and *Brownell & Coleman*, for appellant.

Ballinger, Ronald & Battle and *McGuinness & Miller*, for respondent.

HADLEY, J.—It is sought by this action to procure a decree cancelling and declaring void a certain tax deed. The deed was made by the county treasurer of Snohomish county, by authority of tax foreclosure proceedings. The proceedings were instituted by Snohomish county to foreclose against real estate upon which delinquent tax certificates had been issued to the county. The action was for the purpose of foreclosing the lien for delinquent and unpaid taxes for the year 1895, and years prior thereto, and included a large amount of property other than that involved in the present suit.

The complaint in this action alleges a number of reasons which, it is claimed, rendered the foreclosure inef-

fectual and the deed void. It is alleged that the sum paid at the tax sale was \$224.15, and that the land is worth \$1,500. It is also alleged that a tender of the amount, with fifteen per cent interest per annum, from date of sale, was made, which was refused, and that the tender was kept good by bringing the money into court. A general demurrer to the complaint was sustained. The plaintiff elected to stand upon its complaint, and refused to plead further. Judgment was thereupon entered dismissing the action. The plaintiff has appealed.

This action not only involves the particular property and taxes mentioned in the complaint, but also indirectly involves the validity of the foreclosure proceedings by which Snohomish county attempted to enforce the lien for all delinquent taxes for the year 1895, and previous years, upon property against which certificates of delinquency had not been issued to individuals.

The first point urged is that there was no sufficient description of the land in the foreclosure proceedings. As an example of the several descriptions, the following, as one, appears in the certificate of delinquency, and in the judgment: "NE⁴ of SW⁴ Sec. 4 Twp. 30 Range 6," etc. In the summons the description of the same tract is as follows: "NE¹/₄ SW¹/₄ Sec 4 T 30 R 6," etc. In all the proceedings the property is described by capital letters alone, followed simply by the figure "4" arranged somewhat in the position of an algebraic exponent, or by the fraction "¹/₄". It is urged that the use of the fraction "¹/₄" in the summons is a fatal variance from the description used elsewhere in the proceedings, and, in any event, that the use of mere letters is not a sufficient description. Decisions from the states of Minnesota, North Dakota, and South Dakota are cited in support of appellant's argu-

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ment. The following cases are cited: *Keith v. Hayden*, 26 Minn. 212, 2 N. W. 495; *Knight v. Alexander*, 38 Minn. 384, 37 N. W. 796; *Power v. Larabee*, 2 N. D. 141, 49 N. W. 724; *Power v. Bowdle*, 3 N. D. 107, 54 N. W. 404; *Turner v. Hand County*, 11 S. D. 348, 77 N. W. 589; *Stokes v. Allen*, 15 S. D. 421, 89 N. W. 1023. The above decisions in the main seem to sustain appellant's argument. In this state, however, we have the following statutory provision:

"In all proceedings relative to the levy, assessment, or collection of taxes and any entries required to be made by any officers, or by the clerk of the court, letters, figures and characters may be used to denote townships, ranges, sections, parts of sections, lots or blocks, or parts thereof, the year or the years for which the taxes were due, and the amount of taxes, assessments, penalties, interest and costs." § 1748, Bal. Code.

Appellant anticipates the force of the above statute and insists that it should not weigh against its argument, for the reason that Minnesota has a similar statute, and that the decisions cited from that state were made in the face of the statute. The Minnesota statute appears to have been passed in 1878. See § 1627, Vol. 1, Stats. of Minn. The first cited decision from that state—*Keith v. Hayden, supra*—involved a title made under the general tax law of 1874. The opinion is brief and no reference is made to any statute. Presumably there was no similar statute prior to 1878. The later case of *Knight v. Alexander, supra*, involved a title acquired under a tax judgment entered in 1880. The statute of 1878 was then in force but no reference is made to it in the opinion. The opinion seems to have simply followed *Keith v. Hayden*. We, however, believe that force should be given to our own statute in the premises, and if the abbreviations—whether

of letters or figures—and their relations to each other as used are such as are commonly understood in the descriptions of lands, they should be held sufficient. We think they are such in this case. For example, “NE⁴ SW⁴ Sec. 4 Twp. 30 R. 6” and “NE¹/₄ SW¹/₄ Sec. 4 Twp. 30 R. 6” are commonly understood to mean the same thing, and are read as follows: “Northeast quarter of southwest quarter of section 4, township 30, range 6.” Moreover, we think the weight of authority is against the strict rule announced by the states whose decisions are cited above. *Taylor v. Wright*, 121 Ill. 455, 13 N. E. 529; *Jordan etc. Ass’n v. Wagoner*, 33 Ind. 50; *Harvard v. Day*, 62 Miss. 748; *State v. Mayor*, 36 N. J. L. 288; *Jenkins v. McTigue*, 22 Fed. 148; *Judd v. Anderson*, 51 Iowa 345, 1 N. W. 677; *Minter v. Durham*, 13 Ore. 470, 11 Pac. 231.

The above cases hold that the use of the commonly understood abbreviations, similar to those used in the case at bar, is sufficient, and that a description is certain which can be made certain. After each abbreviated description in the case at bar appeared the following: “40 acres,” which, taken in connection with the well-understood meaning of the abbreviations when applied to land descriptions, we think rendered these descriptions sufficiently certain. The use of the fractional abbreviation “¹/₄” in the summons instead of the figure “4” in its algebraic exponent position was not a variance, since, as a matter of common knowledge, both are used to designate the same thing in the descriptions of lands.

It is next urged that the judgment in the foreclosure case is unintelligible as to amount. The judgment, as far as it refers to the lands involved in this suit, is as follows:

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To whom assessed or name of owner	Description	Sec. or Lot	Twp. or Blk	Range	Acres	Years	Valuation	Total Tax, Int'n & Costs due Jan 31, '98	Amount of Judgment	Paid by	Remarks
J. H. Smock	NE SW ⁴	4	30	6	40	'95	180	4	07		625
J. H. Smock	NW SW ⁴	4	30	6	40	'95	120	4	16		33
J. H. Smock	SW SW ⁴	4	30	6	40	'95	180	6	25		88
John H. Smock ..	NW NW ⁴	9	30	6	40	'95	235	8	15		10
											4365
											4118
											4765
											5286

(NOTE.—The figures in small type in the last three columns appear on the roll in red ink.)

Appellant asks the following questions: "What was the judgment rendered by the court against each tract of land? Take the amount entered against the first description: Was it 407 or 4,365? Are cents or dollars or both referred to? Is the amount the first amount appearing, or the last amount appearing?"

Having regard to appellant's inquiries, we refer first to the perpendicular column at the top of which is the following: "Total tax int'st and costs due January 31, 1898." It will be observed that a line is drawn through the center of the column, so designated, and, from the context, it was evidently intended that this line should fill the place of a decimal designation between dollars and cents, as is usual in such columns. It is therefore apparent that the amount of tax, interest, and costs against the first described tract, at the date named, was \$4.07. Referring now to the next column, designated as "Amount of Judgment," we find the same figures first reproduced in that column, but without any decimal line or point separating them. It is evident, however, from the previ-

ous columns and from the record back of the judgment, that the sum named in the previous column was the amount due as stated in the certificate of delinquency, reckoned to January 31, 1898, and that the certificate was intended to be as of that date. When the same figures reappear in the next column as a part of the amount of the judgment, they must therefore refer to the same thing as in the previous column, since the law first provides that the judgment shall be for the amount of the certificate, and next that fifteen per cent per annum interest shall be added thereto. Bearing the latter fact in mind, and computing interest upon \$4.07 at the rate named, from January 31, 1898, to the date of the judgment—October 29, 1901—we have \$2.26, which figures correspond to those next appearing in the column. It is thus apparent that the first figures mean \$4.07, the original amount in the certificate, that the others mean \$2.26, the interest thereon, and that the two together make the amount of the judgment against the tract of land described along the horizontal column at the left. Thus the judgment is, we think, intelligible as to amount.

The figures further to the right, along the horizontal column, are not designated as bearing any relation to the judgment, and we are, therefore, not necessarily concerned with them, since we can readily determine the amount of the judgment without reference to them. It is explained by counsel, however, that the figures at the right of the judgment column refer to the several amounts of delinquent and unpaid taxes upon said lands for the years subsequent to 1895, and to the interest thereon, and that they were placed there for the convenience of the treasurer in estimating the amount a purchaser would be required to pay.

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Appellant cites *Lawrence v. Fast*, 20 Ill. 338, 71 Am. Dec. 274, as authority that, in a judgment for taxes, the use of mere numerals without marks indicating for what they stand is insufficient. It was there held that the failure to use words or characters indicating dollars, cents or mills was fatal. Breese, J., however, disagreed with the majority and said:

"It is certain to every ordinary intent that the figures in the proper columns indicated cents, or dollars and cents. The most common man would so understand them, and could not be misled by them."

Appellant also cites *People v. San Francisco Savings Union*, 31 Cal. 132. This case seems to have followed the Illinois case cited above. And the same was also true in *Tidd v. Rines*, 26 Minn. 201, 2 N. W. 497. The later Minnesota case, *Gutzwiller v. Crowe*, 32 Minn. 70, 19 N. W. 344, however, held that mere numerals are sufficient to designate the amount of a judgment when a line is drawn between the figures so as to indicate that it is a decimal line. In that case the amount of the judgment was stated precisely as in the total-tax-interest-and-costs column in the case at bar. In the case of *State v. Eureka etc. Co.*, 8 Nev. 15, the Illinois and California decisions upon this subject are reviewed, and that court adopted the views expressed by Breese, J., in his dissenting opinion in *Lawrence v. Fast*, *supra*. See, also, *Jenkins v. McTigue*, *supra*, where the Illinois and California cases are again discussed, but the court declined to follow them. We are disposed to the view that no hard and fast rule should be adopted by which the absence of characters or words indicating the denominations of numerals shall be held to be fatal. Each case should rather be governed by its own facts and surroundings, and if, in connection therewith, the text shows for what the numer-

als were intended, as tested by ordinary usage in such relations, then they should be so read.

The next point urged against the foreclosure proceedings is that the suit was commenced too soon. It is contended that the statute, as found in § 3, p. 385, Session Laws of 1901, prohibited the bringing of the suit when it was brought, and that the court did not, therefore, have jurisdiction. That act, by an emergency clause, went into effect March 20, 1901. It was therefore in force when the first publication of the summons in the foreclosure case was made, May 24, 1901. It will be observed, by reference to the act, that it provides that, after the expiration of five years from the date of delinquency, when no certificates have been issued as to the property, certificates of delinquency may issue on such remaining property, to the county, and that the same shall be thereafter foreclosed. The tax for the year 1895 became delinquent May 31, 1896, and it is manifest that the foreclosure was commenced prior to the expiration of five years from the date of delinquency, and which, if the statute of 1901 governed this certificate, was before the certificate itself could issue.

A necessary question to be considered is, when was the certificate of delinquency issued? Appellant contends that it was issued May 9, 1901, which was after the 1901 law took effect, and before the expiration of five years from date of delinquency. Respondents claim that the certificate was issued January 31, 1898. If issued on the latter date, it was authorized by the laws of 1897, § 98, pp. 182, 183, which placed no limitation upon the time as to when the certificate might issue to the county. If issued then it was a certificate which could have been foreclosed in May, 1901. The five-year postponement

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applied only to certificates thereafter issued upon property against which no issue had already been made.

The complaint in this suit alleges, that prior to January, 1901, the then county treasurer made out books of certificates running to the county, including the land involved in this action, but did not sign them; that, when the present treasurer first took office, in January, 1900, he found said books of certificates unsigned as aforesaid, and thereafter made copies of such certificates, likewise in book form, but omitting descriptions of such land as had been redeemed; that on May 9, 1901, the said certificate of delinquency books, so copied and signed, were taken by the county treasurer to the office of the clerk of the superior court, to which officer the treasurer stated that he filed the books. It thus appears from the complaint that the former treasurer did make out certificate of delinquency books to the county, and the same were kept in his office. A copy of the certificate, so made out as to the property involved in this suit, is filed with the complaint as an exhibit. It shows that the interest on the tax was figured to January 31, 1898; thus making it clear that the former treasurer intended the books as certificates of delinquency, issued as of that date. His successor adopted the same certificates, and neither made any new computation as to interest, nor otherwise changed them.

It is true the former treasurer had not formally signed the books of certificates, but they showed plainly what they were, and for what they were intended. Being in his custody and possession as the agent of the county, the county treated them as certificates of delinquency held by it. The so-called certificates, when issued to individuals, must be signed in order to effect a transfer of the tax

lien to the holder; but, in the case of the county, the lien had at all times been held by it, and the mere signing of the books by its officer would in no sense have transferred or changed the holding of the lien. The act done by the county, through its agent, was the essential thing, and that act was the preparation of a record which was kept in his office, and which showed a statement of delinquent and unpaid taxes, for which no certificates had issued to individuals, with a further statement of the amount due at the time against each tract of land. It would seem that any vital or forceful purpose, served by the signature of the officer in such a case, is accomplished if he signs it before filing in the office of the clerk of the superior court. The record has then passed from the possession of the tax collecting department to serve judicial purposes. This was so signed before it was filed in the clerk's office. The record upon its face showed its purpose, and the signature of the officer, in effect, amounted to a mere statement that such was theretofore a record in the treasurer's office. We believe, therefore, that, for all essential purposes, the statement made by the county in this instance, and which the statute denominates a certificate of delinquency, was in fact issued January 31, 1898. It follows that the foreclosure suit was not commenced too soon, and that the court did have jurisdiction of the cause.

The next objection to the sufficiency of the foreclosure is, that the certificates of delinquency were not properly filed in the office of the clerk of the superior court before publication of summons. The complaint, however, shows that a *nunc pro tunc* order was made by the court in the foreclosure cause, by which it was declared that the certificates were in fact filed in the clerk's office on May 9,

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1901, and it was directed that they be so marked, which was done, and the file mark was changed from June 10, 1901, to the above named date. That date was fifteen days before the first publication of the summons. It having been already determined that the court had jurisdiction of the cause by reason of the time the certificates were issued, and it appearing by the record that the certificates were filed in time, it follows that the point now raised relates to a mere irregularity which should have been raised in the foreclosure case. While the *nunc pro tunc* order was made after judgment, yet, assuming, as we must, that the record speaks the truth, the correction was such a one as could have been made during the progress of the action, under § 18, p. 299, Laws of 1899. Appellant is therefore estopped to raise the objection now. See, § 1767, Bal. Code. Also, *Swanson v. Hoyle*, 32 Wash. 169, 72 Pac. 1011. The summons and its publication, we think, complied with the law. The property owner was therefore within the jurisdiction of the court, and was required to take notice of the action. The summons was by publication, it is true, but, under § 3, pp. 385, 386, Laws of 1901, "all persons owning or claiming to own, or having or claiming to have, an interest therein are hereby required to take notice of said proceedings, and of any and all steps thereunder."

Appellant insists that, notwithstanding the statutes above cited and quoted, it is not estopped to raise objections now, and argues that Illinois has similar statutes, but that it has been held in that state that, where the taxpayer does not appear and make objection prior to the rendition of the judgment, there is no estoppel. It appears to have been so held in *Belleville Nail Co. v. People ex rel.*, 98 Ill. 399. We, however, find no Illinois

statute with a specific declaration that parties shall be estopped, as is the case in our statute cited above. With such a provision in our law, and with the positive declaration, quoted above, that all interested persons shall take notice of the steps taken in the cause, we see no reason why the statute shall not be given the force which was evidently intended, notwithstanding the fact that the summons is by publication only. The difficulties attending the collection of public revenue are many at best, and the relation of the citizen to the subject is somewhat different from his relation to the ordinary contractual obligations. He must take notice that by law his property is assessed each year, that the tax is due and delinquent at a fixed time, is a lien upon his land, and, if not paid, that the lien shall be enforced by foreclosure proceedings, and in the manner provided by statute. The action is not *in personam* but *in rem*, and we see no reason for making the distinction recognized by the above Illinois case, apparently based upon the ground that the service was by publication only.

The last objection urged to the validity of the tax deed under the foreclosure is that, by the terms of § 70, pp. 353, 354, Laws of 1893, under which the taxes of 1895 were assessed, the treasurer was required, upon receiving the tax books, to give notice, by publication in a newspaper, that the books had been so turned over to him. It is urged that there is no record of proof that such notice was given. The complaint, however, does not allege that such notice was not in fact given, but simply that no record proof of such notice exists. Under the allegations, the absence of the proof amounts to a mere irregularity. It is, however, insisted that, under the authority of *Vestal v. Morris*, 11 Wash. 451, 39 Pac.

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960, this is a fatal omission. It will be observed that the procedure, there under consideration, related to a summary sale for taxes, in which the taxpayer had no day in court, and in such cases it is the general rule that a strict observance of statutory provisions must appear of record. But under our foreclosure system, with the parties before the court, such irregularities as the omission to make the proof of notice, urged here, may be supplied and the correction made by the court. *Smith v. Newell*, 32 Wash. 369, 73 Pac. 369; *Jefferson County v. Trumbull*, ante, p. 276. The distinction to be observed between procedure for summary sales and that in foreclosure was discussed in *Gove v. Tacoma*, ante, p. 434.

Other points raised by counsel have not been specifically mentioned, but we believe they are so involved in what has been said as to make direct reference to them unnecessary. The discussion has necessarily been extended, but counsel's labors have been fruitful of suggestions involving much detail. We believe the foreclosure procedure was sufficiently within the law authorizing counties to foreclose their unassigned tax liens, and that appellant is now estopped to attack them or the deed made thereunder.

The judgment is affirmed.

FULLEERTON, C. J., and MOUNT, DUNBAR, and ANDERS, JJ., concur.

[No. 4954. Decided April 9, 1904.]

THE STATE OF WASHINGTON, *on the Relation of George B. Smith, Respondent*, v. FRED BLUMBERG, *as Auditor of Skagit County, Appellant*.¹

APPEAL—BONDS—EXEMPTION OF COUNTY WHEN NOT AVAILABLE TO COUNTY OFFICER—JUDGMENT AGAINST COUNTY—DUTY OF COUNTY AUDITOR TO ISSUE WARRANT. Where a county auditor appeals from a judgment of mandamus against him, compelling him to issue a warrant on account of a judgment regular on its face, recovered against the county, and which judgment is not appealed from or contested by the county, and no question is raised as to the fund from which it is to be paid, the appeal is not an appeal in the interest of the county, dispensing with the necessity of an appeal bond, since the auditor's duty is plain and the appeal one in his own interest in which he has become involved by his own course; and the appeal should be dismissed where no appeal bond is given.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered April 8, 1903, granting a peremptory writ of mandamus, after a hearing on the merits before the court without a jury. Appeal dismissed.

J. C. Waugh, for appellant.

Million & Houser, for respondent.

HADLEY, J.—In this case the superior court of Skagit county issued an alternative writ of mandamus, which, after a hearing, was made peremptory, against Fred Blumberg, the auditor of said county, as respondent in the proceeding. The relator, George B. Smith, had theretofore, on the 3d day of July, 1903, obtained a judgment against said county for the sum of \$38 and costs. The judgment was obtained before a justice of the peace in said county. No appeal was taken, and it was regular upon its face.

¹Reported in 76 Pac. 272.

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Thereafter the holder of the judgment entered satisfaction thereof on the justice docket, presented to said auditor a certified transcript of the docket of judgment, including the satisfaction, and demanded a warrant for the amount, in accordance with the provisions of § 5676, Bal. Code. The demand was refused, and this proceeding in mandamus was then brought to obtain a writ compelling the auditor to issue a warrant. From the judgment authorizing a peremptory writ the auditor has appealed to this court.

The relator in the action (the respondent in this appeal) moves to dismiss the appeal. Among other grounds, it is urged that the motion should be granted because the appellant has never given any appeal bond. The appellant contends that he is exempt from giving an appeal bond, under the rule followed in *Townsend Gas etc. Co. v. Hill*, 24 Wash. 469, 64 Pac. 778. That action was brought against the appellants as officers of the city, and not against the city proper. The record was such as made it apparent that the controversy was being waged in behalf of the city as the real party in interest. Intervening legislation, with regard to the maintenance of certain funds required to be kept by municipal corporations, created such uncertainty as to what fund the warrants should be drawn against as gave rise to a substantial controversy, properly calling for judicial investigation. The obligation itself was not disputed, but there was a vexed question for actual litigation, viz.: from what fund should the city pay the debt. Under such circumstances it was held that the appellants were appealing in behalf of the city as the real party in interest, and that the exemption from giving appeal bonds, accorded to municipal corporations, should apply in that case.

In the case at bar, however, the county is not litigating any question. The debt was established by the judgment.

The latter was uncontested by appeal, and the obligation is ascertained and fixed. The judgment shows, upon its face, that it was based upon a simple contract for physician's services, rendered to indigent persons as county charges. There can be no question as to the fund from which the debt should be paid, and no such question is raised in appellant's pleadings. As an excuse for refusing to discharge his duty and issue the warrant, appellant, merely in a collateral manner, attempts to attack the judgment, which is regular upon its face, and in the validity of which the county itself has acquiesced by not contesting in a direct manner. The obligation being judicially and finally established, must, at least eventually, be met by the county, regardless of this litigation in which appellant, by his own course, has become involved. Appellant's duty to issue the warrant was therefore plain, and one which the county, by its course in the premises, must, from a legal standpoint at least, have expected him to discharge. The county has, therefore, no interest in appellant's attempted justification, or in the appeal, but the appeal is in his own behalf. In such case, we think there is no exemption from giving an appeal bond. The statute, § 6505, Bal. Code, provides:

"But no bond or deposit shall be required when the appeal is taken by the state, or by a county, city, town, or school district thereof, or by a defendant in a criminal action."

It will be observed that a strict reading of the statute declares the exemption only when the appeal is taken by the municipality itself. In *Townsend Gas etc. Co. v. Hill*, *supra*, the construction of the statute certainly extended the rule as far as any inference to be drawn from the statute will warrant, and we do not think it should be construed to include such a case as this, where only a clear,

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Syllabus.

ordinary duty of the officer is involved, and where the municipality can have no contestable interest. The test is not simply that the officer is designated as such in the suit, but rather whether the action involves merely his own conduct and duty, or includes something of actual interest to the municipality.

The motion to dismiss the appeal is granted.

FULLERTON, C. J., and ANDERS and MOUNT, JJ., concur.

[No. 5078. Decided April 9, 1904.]

THE STATE OF WASHINGTON, *on the Relation of Dora Twigg, Plaintiff*, v. THE SUPERIOR COURT OF KING COUNTY, *Defendant*.¹

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MORTGAGES—FORECLOSURE—PLEADING—PRAYER OF COMPLAINT—JUDGMENT FOR DEFICIENCY. A deficiency judgment upon a mortgage foreclosure is authorized by a prayer in the complaint for judgment generally, for a foreclosure decree and sale, and further proper relief (*Rogers v. Turner*, 19 Wash. 399, followed).

PROHIBITION—TO PREVENT THREATENED ERROR—REMEDY BY APPEAL—VACATION OF JUDGMENT. Prohibition will not lie to prevent the threatened erroneous vacation of a judgment, where the same would be a final disposition of the case, since there is an adequate remedy by appeal.

APPEAL—FINAL ORDER—JUDGMENT—VACATION BECAUSE NOT AUTHORIZED BY COMPLAINT—ORDER AFTER MORTGAGE FORECLOSURE SALE—APPEALABLE AS AFFECTING SUBSTANTIAL RIGHT. Where, upon a mortgage foreclosure, there is a sale of the property and a deficiency judgment entered, an order setting aside the deficiency judgment on the ground that it was not authorized by the prayer of the complaint would be a final disposition of that part of the case, and appealable as affecting a substantial right, under Bal. Code, § 6500, subd. 1.

Application for a writ of prohibition, filed in the supreme court March 10, 1904, to prevent the threatened

¹Reported in 76 Pac. 282.

vacation of a judgment by the superior court of King county, Bell, J. Writ denied.

Fred H. Peterson, for relator.

H. E. Peck, for respondent.

MOUNT, J.—Original application for a writ of prohibition. It appears from the record herein that the relator, on May 12, 1899, commenced an action in the superior court of King county against Fannie James and J. L. James, husband and wife, to recover upon two promissory notes, dated in April, 1893, and to foreclose a mortgage, given upon real property in said county to secure the said notes. Personal service of the summons and complaint was made upon each of the defendants in that action. The prayer of the complaint was as follows:

“Wherefore, plaintiff demands judgment against said defendants and each of them upon the first cause of action in the sum of \$500, with interest from April 18, 1893, at twelve per cent per annum, until paid, and upon the second cause of action in the sum of \$226.60, with interest from April 29, 1893, at twelve per cent per annum until paid, and for taxes paid in the sum of \$72.60, and attorney’s fee in the sum of \$50, and for all costs and disbursements herein taxed; that a decree be entered foreclosing the aforesaid mortgage and that the aforesaid judgment and the whole thereof be paid out of the proceeds accruing from the sale of the property in said complaint and mortgage described, and that the plaintiff or any person may become a purchaser and be let into possession of said premises upon the production of a certificate of purchase, and that said defendants and each of them be forever barred of any and all right and title whatsoever in and to said lots or either of them except the right to redeem, and that plaintiff have such other and further relief as may seem proper herein.”

Neither of the defendants appeared in response to said

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summons and complaint, but both made default. Thereafter, on June 8, 1899, a judgment was entered as follows, omitting the title:

"The court having made its findings of fact and conclusions of law in said action, now, upon motion of Fred H. Peterson, attorney for plaintiff, this court enters the following decree: Wherefore it is hereby ordered, adjudged and decreed that said plaintiff have and recover from said defendants and each of them the sum of \$1,146.20, with interest thereon at the rate of twelve per cent per annum until paid, and an attorney's fee of \$50, and all costs and disbursements herein; that the mortgage described in the complaint in said action be foreclosed and the property therein described, to wit, lots 4 and 5 in block 57, in Gilman Park in said King county, be sold by the sheriff of said county in the manner provided by law, and that the proceeds thereof be applied in payment of the aforesaid judgment, attorney's fee and costs and interest, and the plaintiff have a judgment for any deficiency that may remain after applying the proceeds of such sale as aforesaid, and that execution may issue for such deficiency against the property of each of said defendants; that said plaintiff or any other person may become a purchaser at such sale, and that the purchaser be let into possession of said premises upon the production of a certificate of purchase, and that said defendants and each of them be forever barred from any and all right, title and interest whatever in and to the said property except the right to redeem as provided by law."

Subsequently, in July, 1899, the property described in the decree was sold for \$500, leaving a balance of \$743 unsatisfied. The sale was subsequently confirmed and the deed issued. Nothing further was done in the case until February 17, 1904, when the defendant therein appeared specially, and moved the trial court to set aside and vacate the judgment, upon the grounds, that it is void because the court had no jurisdiction to grant the relief

claimed in the decree; that it was rendered by default, without proof of service; that it was procured by fraud; and that the complaint did not demand a deficiency judgment. When this motion was heard, the judge stated that he would grant an order vacating the deficiency judgment, on the ground that the prayer of the complaint did not authorize such judgment. No order was made, however, the court granting the plaintiff time to apply here for a writ of prohibition, which was done, and a temporary writ was issued.

The main contention upon the argument here is upon the question whether the lower court had jurisdiction to grant a deficiency judgment, upon the prayer of the complaint above quoted, where the defendants defaulted. We have no doubt upon this question. It falls squarely within the rule in *Rogers v. Turner*, 19 Wash. 399, 53 Pac. 663. While we are, for that reason, of the opinion that the lower court is threatening to commit error, yet this is not enough to authorize us to issue the writ prayed for, because, under the statute, the writ will issue only "where there is not a plain, speedy and adequate remedy in the ordinary course of law." § 5770, Bal. Code. This court has frequently held that the writ will not issue for the purpose of correcting or reviewing errors of the trial court. *State ex rel. Foster v. Superior Court*, 30 Wash. 156, 70 Pac. 230, 73 Pac. 690, and authorities there cited. It follows that the writ will not issue to prevent the court from committing a threatened error.

It is true, as argued by relator, that we have many times held that there is no appeal from an order vacating a judgment. *Nelson v. Denny*, 26 Wash. 327, 67 Pac. 78. But, in all the cases where we have so held, the effect of the order vacating the judgment was not a final

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disposition of the case. It permitted the parties to contest the case upon the merits, and a subsequent final judgment to be entered, from which an appeal might be taken. The reason given for the rule in such case is that such practice needlessly delays litigation, and permits causes to be brought here by piecemeal. But such is not this case. If the lower court shall make the order setting aside the deficiency judgment because the court was not authorized to enter it, under the prayer of the complaint, that order will be a final determination of that part of the judgment. It will completely determine the case, and will certainly affect a substantial right. It is clearly appealable, under subd. 1, § 6500, Bal. Code.

For this reason the writ prayed for is denied.

FULLERTON, C. J., and ANDERS and HADLEY, JJ., concur.

[No. 4899. Decided April 11, 1904.]

L. WILLET, *Appellant*, v. MRS. FELIX WARREN, *Respondent*.¹

GUARDIAN AND WARD—APPOINTMENT OF GUARDIAN FOR ORPHAN—EVIDENCE—SUFFICIENCY—CLAIM OF RELATIVES—INTERESTS OF WARD CONTROLLING—DECISION OF LOWER COURT—REVERSAL WHERE TESTIMONY IS UNCONTRADICTED. Where, for three years before her death, a widow had left her infant child in the care of W and his wife, who were living in good circumstances in a city with good school, church, and social advantages, and who had shown themselves peculiarly adapted to the care and custody of the child, to whom they had become greatly attached, and the child, although of non-consenting age, desired to remain with them, it is error, on the death of the mother, to refuse to appoint W guardian of the infant, and to appoint as guardian an aunt living in the mountains in Idaho, who had never before shown any interest in the child, although a prosperous person of good

¹Reported in 76 Pac. 273.

character, consanguinity alone appearing to be the only reason entitling her to the preference; and the evidence being brief and practically uncontradicted, the supreme court will not hesitate to reverse the lower court, since the interests of the ward are controlling, and relatives have no legal right to the appointment.

Appeal from an order of the superior court for Spokane county, Kennan, J., entered January 17, 1903, upon conflicting applications for the guardianship of a minor after a hearing on the merits. Reversed.

John M. Gleeson, for appellant.

Del Cary Smith and A. J. Laughon, for respondent.

DUNBAR, J.—This is an appeal from an order refusing to appoint this appellant, L. Willet, guardian of Mildred Strong, a minor, and appointing respondent, Mrs. Felix Warren, as such. Mrs. Betty Strong, the mother of the minor, was left a widow several years ago, with an infant child, Mildred, depending upon her for support. Something over three years before the commencement of this action, Mrs. Strong placed Mildred in the care and custody of the appellant and his wife, in the city of Spokane, where, with the exception of absences a time or two on brief visits, she has continuously remained, and is now, in their care and custody. It was the agreement, when Mildred was placed in the home of the Willets, that her mother should pay her board and necessary expenses for taking care of her, which she did for some time. But this consideration ceased after a time, and the child was allowed to stay with the Willets, where she was provided with the necessities of life and sent regularly to school and church.

In October, 1902, Mrs. Strong became seriously ill, and went to the home of her sister, the respondent, in the state of Idaho, where she died in a few days. After

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the death of Mrs. Strong, the respondent came to the city of Spokane and filed a petition, asking that she be appointed guardian of the said Mildred. The appellant filed objections, and also a petition asking that he be appointed guardian of the minor, Mildred Strong. After hearing the respective applications, which were heard together, the court appointed the respondent, who is the aunt of the minor child, her guardian, and from this judgment of appointment this appeal is taken.

The testimony in this case is brief, and we have carefully examined it, and, while ordinarily in a case of this kind the judgment of the lower court would have great weight with an appellate court, in this case the testimony is all here and practically uncontradicted. The minor is absolutely without estate, so that there is no question of financial motive attributed to either of the applicants. And the court found that both applicants were of good moral character, and that each was capable of supporting the minor in accordance with her station in life. The court presumably awarded the guardianship to the respondent on the sole ground that she was related by consanguinity to the minor, and, everything else being equal, we think this would be a just determination.

But in this case, during the life of the mother, the relatives had not in any way assisted in maintaining this minor, but such assistance had been rendered exclusively by the appellant and his wife. She had lived with them for over three years. The undisputed testimony is that a great attachment had grown up between the Willets and Mildred. They had advanced her interests at the sacrifice of their own private means. They had sent her continuously to the public schools in the city of Spokane; had prepared her for Sunday school, and sent her regu-

larly to the Methodist Sunday school in that city. Her teachers testified that she seemed to be well taken care of. She herself testified that she was satisfied with the Willets, that she was attached to them, and did not want to leave them and go and live with her aunt. And, while it is true that she is not of a choosing age, so far as the law is concerned, her choice, even at a younger age, is a circumstance to take into consideration in her disposition.

The relatives have no legal right to her custody, and the main consideration is the welfare of the child. While, as we have before said, the ties of natural affection are not to be disregarded, yet it does not always follow that these ties exist because of kinship or consanguinity. The respondent and her husband are not residents of this state. They live in Idaho, and, while their good character seems to be established by the testimony, and undisputed, their circumstances, it seems to us, do not present as favorable conditions for the rearing of the child as do the circumstances of the Willets. The Warrens in the summer time live on a mountain, some forty miles from Lewiston, in Idaho, where Mr. Warren keeps a stage station and hotel, or wayside house. It does not appear where they live in the winter time, but it is conceded that they are residents of the state of Idaho. The Willets are residents of the city of Spokane, in good circumstances, convenient to schools, churches, Sunday schools, and society. The court found, that the appellant and his wife were in comfortable circumstances; that they cared for and educated Mildred in the public schools of Spokane, and sent her regularly to Sunday school, during the time that she was with them; that they are able, financially, to care for and educate her; and that they

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are of good moral character. The testimony of the neighbors was to the effect, that Mrs. Willet was peculiarly adapted to the care and custody of the child; that she had lost a child of her own about Mildred's age, shortly before she took charge of her; that Mrs. Strong was recommended to send Mildred to Mrs. Willett by neighboring women who knew the latter, and had known her for a long time, and who testified that they would be glad to have her take charge of their own children, in case of their decease. And, while the record discloses nothing against the character of the respondent and her husband, it seems to us, under all the circumstances of this case—in consideration of the comparative locations of the different applicants, one being outside of the jurisdiction of this court, and the other within it; in consideration of the fact that the appellant and his wife have been tested, and found to be worthy of her custody, and that a mutual affection and attachment exist between the Willets and the minor, and that the school, church, and society privileges of the ward would be more surely secured under the guardianship of the appellant and his wife—that it would be more in conformity with justice, and to the best interest of the ward, that the relationship existing between Mildred and the Willets should not be disturbed, and that she should be allowed to remain in the house that has sheltered and protected her for so long, until she arrives at the age when she can choose her own guardian.

The judgment is reversed, with instructions to the lower court to grant the petition of the appellant.

FULLERTON, C. J., and HADLEY and MOUNT, JJ., concur.

[No. 4941. Decided April 11, 1904.]

C. P. FERRY *et al.*, Respondents, v. CITY OF TACOMA *et al.*, Appellants.¹

MUNICIPAL CORPORATIONS—ASSESSMENTS FOR LOCAL IMPROVEMENTS—RESTRICTION TO FIFTY PER CENT OF ASSESSED VALUE—CONSTRUCTION OF CHARTER PROVISIONS. The provision in the city charter and ordinances of Tacoma, p. 77, § 137, that no local improvement shall be made when the estimated cost thereof shall exceed fifty per cent of the assessed value of the property to be assessed, refers to the total assessed value of the property in the district as assessed for general taxation, and does not invalidate an assessment against particular lots because in excess of fifty per cent of the assessed valuation of such lots; since there is no preliminary provision for an appraisal of values, and the other provisions of the charter show that the estimated cost and the assessed value referred to are known and considered before the amount charged against any particular lot could be ascertained; and since the charge for local improvements is not based on said assigned value, but upon the accruing benefits to the particular lots.

SAME—ESTOPPEL OF PROPERTY OWNERS—OBJECTIONS TO BE MADE BEFORE CITY COUNCIL. Where property owners fail after notice to appear before the city council and object to local assessments, they are estopped to question the regularity of the assessment, if the total cost of the improvement was within the fifty per cent value of all the property to be assessed.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered September 12, 1903, in favor of plaintiffs, upon overruling a demurrer to the complaint. Reversed.

Emmett N. Parker and William P. Reynolds, for appellants.

E. R. York, for respondents.

¹Reported in 76 Pac. 277.

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MOUNT, J.—This action was brought by the plaintiffs to restrain the defendants from proceeding to enforce a special assessment against certain real estate, for street improvements in front of said real estate, in the city of Tacoma, upon the ground that such assessment was unauthorized and void. The defendants filed a general demurrer to the complaint. This demurrer was denied, and defendants elected to stand thereon, and judgment was entered in favor of the plaintiffs. Defendants appeal.

In substance the complaint states, that the plaintiffs are the owners of certain lots in the city of Tacoma; that in July, 1902, the said city instituted proceedings for the improvement of South O street, from the center line of South Fifteenth street to the north boundary of C. P. Ferry's addition, by grading, curbing, guttering, and sidewalking said street, the cost thereof to be charged against the abutting property; that the estimated cost of the improvements was \$2,933; that notice was duly given, and no protests against such improvements were filed; that subsequently, on October 17, 1902, an ordinance was regularly passed, providing for the said improvement, and the payment of the cost thereof by special assessment of the property benefitted; that, pursuant to said ordinance, the improvements were duly made at a cost of \$2,929, and an assessment roll was made, apportioning and charging the expenses of such improvements against the several lots subject thereto; that notice of the filing of said roll was duly given, and no protests were made against the same; that subsequently an ordinance was duly passed, confirming the said assessment roll, and providing for the disbursement of the money collected upon such assessment. Thereupon said roll was placed in the hands of the city treasurer for collection. The complaint

then states the amounts assessed against each of the plaintiffs' lots, and the location of said lots, and alleges as follows:

"(8) That at all the times herein mentioned the city charter of said city under and pursuant to the authority of which said improvement was made, provided in § 137 as follows: 'That no improvement shall be made when the estimated cost thereof shall exceed fifty per cent of the assessed value of the property to be assessed.' And also provides in § 160 as follows: 'That in no case shall the cost of any improvement authorized by the city council to be done exceed the estimated cost of the city engineer.' And also provides in § 138 as follows: 'Any lot or parcel of land lying directly and lengthwise along the line of improvement at any street corner or intersection shall be assessed one-half of the amount as determined by its frontage, and the remaining one-half assessed upon the lots to the center of the block.'

"(9) That in and by the said general assessment of said lots for the purpose of city and county taxation prior to said special assessment for improvement of South O street, being the assessment made in and for the year 1902, the said lots 11 and 12 in block 1329 and said lot 11 in block 1529 were each and all severally assessed at the sum of \$130 and no more, and pursuant to said general assessment of each of said lots at the sum of \$130 and the provisions of the city charter the said lots and each of them in this paragraph mentioned were not lawfully subject to said special assessment or lawfully chargeable with the cost or expense for the improvement of said South O street in an amount to exceed the sum of \$65 per lot, and said assessment as charged upon each of said lots in the sum of \$118.70 is grossly excessive, unjust, illegal, unauthorized and void, and beyond the power or jurisdiction of the said city and is greatly beyond the fair, reasonable, or actual value or benefit of said lots by reason of said improvement having been made, and said special assessment for said improvement as made and charged upon said lots was and is wholly beyond

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the power or jurisdiction of said city to make, unauthorized, illegal and void.

"(10) That the estimated cost of said improvement chargeable to each of said lots 11 and 12 in block 1329 and lot 11 in block 1529, under the estimate and diagram made by the city engineer of said city in the aggregate sum of \$2,933, was and is substantially the identical amount subsequently and actually charged for said improvement upon said special assessment roll in the aggregate sum of \$2,929, to wit, the sum of \$118.70 per lot, and said amount is in excess of the amount lawfully chargeable for said improvements upon each of said lots under the provisions of the city charter of said city in the sum of \$53.70 per lot.

"(11) That the said special assessment, so unlawfully charged againsts plaintiffs' said lots, is an apparent lien and charge thereon and is a cloud upon their title to said property and very materially damages and reduces the value and prevents any sale of said property, and the defendants are proceeding and about to enforce said assessment against said property and will, unless said assessment be set aside and cancelled and the defendants restrained therefrom, offer said property for sale and sell said property for said assessment, penalty, interest, and costs upon said assessment becoming delinquent, whereby plaintiffs will be greatly and irreparably damaged, and plaintiffs have no other or sufficient or adequate remedy in the premises."

Then follows the prayer.

No question is made here against the regularity of the proceedings, but it is contended by the respondents, and was so held by the lower court, that the amount of the assessment was beyond the power of the city, by reason of the fact that the assessment against each of respondents' lots was more than fifty per cent of the assessed value of such lot. The city charter of the city, after pro-

viding the manner in which street improvements may be made, and for assessments for such improvements, provides:

"That no improvement shall be made when the estimated cost thereof shall exceed fifty per cent of the assessed value of the property to be assessed." § 137, p. 77, Charter and Ordinances of Tacoma.

The complaint shows that the improvements and assessment proceedings were regular, that due notice was given and no objection made thereto, and that respondents' lots were each charged with more than fifty per cent of their valuation; but it is not shown, nor is it claimed, that the total or estimated cost of the improvement was more than fifty per cent of the total assessed valuation of the whole property to be assessed. The case turns upon the construction of the charter provision above quoted.

This provision was inserted no doubt for the purpose of placing a limitation upon the power of the city to make street improvements. By this limitation, the city may not make an improvement the cost of which exceeds fifty per cent of the assessed valuation of the property to be assessed for such improvement. Appellants insist that the word "property" must be held to mean all the property in the assessment district, while respondents insist that it must be held to mean each parcel of property. The section is susceptible of either construction, and good reasons may be advanced therefor. But, when the whole chapter is considered, we think there can be little, if any, doubt that the provision refers clearly to the whole of the property in the district, as contended for by appellants.

Art. 12 of the charter relates to "street improvements." The first section of this article is numbered 135. That section provides that applications for street improvements must be made to the commissioner of public works, and shall be signed by the owners of more than one-half of

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the property abutting upon the street sought to be improved, but that the city council by a two-thirds vote may, without petition, order an improvement. Section 136 provides that, upon the passage of a resolution by the council for any improvement, the commissioner of public works shall cause the city engineer to prepare a survey, diagram, and estimate of the entire cost of such improvement, which diagram and estimate shall be filed in the office of the said commissioner, and notice thereof shall be given by publication; which notice shall contain, among other things, a specification of the street to be improved, the kind of improvements, the estimated cost thereof, and a general description of the property to be charged with the improvements. Then follows a provision for remonstrance by property owners interested. The next section in full is as follows:

"§ 137. If no remonstrance be made and filed as provided in the last preceding section, then the owners of the lots and parcels of land described in said notice shall be deemed to have consented to such improvements; or, if such remonstrance has been made and filed, and the city council has ordered such work to be done, or improvement to be made, the expense thereof shall be charged to the property described in said notice in the manner as hereinafter provided, and the commissioner of public works shall at his earliest convenience, and within six months thereafter, establish the proposed grade or make the proposed improvement; *provided, that no improvement shall be made when the estimated cost thereof shall exceed fifty per cent of the assessed value of the property to be assessed.*"

The chapter continues and points out how the costs of the improvements shall be assessed against the property, the form of the assessment roll, and the notice thereof, and the manner of collection, etc. There is no provision for an appraisement of the value of the property. It will

be seen that the provisions of § 137 and preceding sections are preliminary to the proposed improvements. The estimated cost of the improvements, and the "assessed value" of the property, are known before the improvements are ordered. The improvements are ordered before the expense thereof is assessed against the separate parcels or lots of land. It is not reasonable to suppose that the charter intended that an improvement might be ordered which would become invalid by reason of the fact that an assessment against one of the lots should amount to more than fifty per cent of the assessed value.

Furthermore, the assessment against the different lots for the cost of the improvements is not based upon the "assessed value." This value has nothing whatever to do in determining the amount each lot must pay toward the cost of such improvements. These costs are apportioned according to benefits for the size of the lots. The office of the assessed value is only to determine whether or not the estimated cost is within the fifty per cent limitation. The term "assessed value" evidently refers, as alleged in the complaint, to the value of the property as assessed for general taxation, next prior to the time the improvements are ordered. When the estimated cost of the whole improvement is seen to be within the fifty per cent of the assessed value of the whole property to be assessed, the city council are authorized to make the improvement. This, it seems, is the logical construction, and the one intended by the charter. The ordinary and usual construction of the words used also indicates that "the property to be assessed" means the whole property.

Appellants also argue that respondents are now estopped to question the assessment, for the reason that respondents did not avail themselves of the provisions of the act of

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1901, Laws of 1901, p. 240. This court has frequently held that, where a city is authorized to make improvements, and where notice is given to property owners, as required by law, and these property owners do not appear in the tribunal provided for that purpose, they are estopped to question the regularity of the assessment. *McNamee v. Tacoma*, 24 Wash. 591, 64 Pac. 791; *Annie Wright Seminary v. Tacoma*, 23 Wash. 109, 62 Pac. 444; *Potter v. Whatcom*, 25 Wash. 207, 65 Pac. 197. Respondents apparently concede this general rule, but contend that the city is without jurisdiction when the assessment exceeds fifty per cent of the assessed value of the separate lots. We have seen above that this limitation does not apply to individual lots, and, therefore, when it appears that the total cost of the improvement is within the fifty per cent value of all the property to be assessed, the city is acting within its authority.

The judgment of the lower court is therefore reversed, with instructions to sustain the demurrer.

FULLETON, C. J., and HADLEY and DUNBAR, JJ., concur.

[No. 4895. Decided April 12, 1904.]

CARL A. SANDER *et al.*, Respondents, v. CHARLES H. WILSON *et al.*, Appellants.¹

IRRIGATION—WATERS—ACTION TO ENJOIN DIVERSION—PLEADING—PARTIES DEFENDANT—WHEN UNNECESSARY. In an action by a lower riparian owner on W creek to restrain the wrongful diversion of the upper waters therefrom into D creek, which naturally received part of the flow from W creek, an answer setting up that many riparian owners on D creek other than the defendants had been using the waters naturally flowing in D creek, and asking that they be made parties, does not raise a defect of

¹Reported in 76 Pac. 280.

parties defendant, where there is nothing to prevent the court from passing on the rights of the parties before it, and where the answer does not allege that such parties were using the waters adversely to plaintiff.

SAME—DOCTRINE OF APPROPRIATION CONFINED TO PUBLIC LANDS—PRIOR RIGHTS NOT AFFECTED BY ACT OF 1873. The doctrine of the prior right to waters for irrigation by appropriation applies only to public lands, and the act of 1873, declaratory thereof, does not apply when the lands cease to be public, and has no application to riparian rights which had become fixed prior thereto.

SAME—IMMATERIAL ISSUES—PRIORITY OF APPROPRIATION BY PARTIES DISCLAIMING ADVERSE INTEREST. In an action to enjoin the diversion of waters from W creek into D creek, where the whole controversy is over the question of whether any such diversion has been made, the priority of appropriation of the parties using the waters naturally flowing into D creek, and who disclaim any right to the waters naturally flowing in W creek, is not material.

SAME—DECREE DETERMINING AMOUNT OF WATER TO WHICH PARTIES ARE ENTITLED—DEFINITENESS. A decree determining that the plaintiffs were entitled to 1,300 inches of water in W creek, measured under a four-inch pressure, according to the custom of miners, and giving the defendants a right to move for a modification of the decree if circumstances warranted it, to obtain any surplus that might thereafter exist, is sufficiently definite and certain.

Appeal from a judgment of the superior court for Kittitas county, Rudkin, J., entered March 30, 1903, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, determining the rights of riparian owners to waters for purposes of irrigation. Affirmed.

Pruyn & Slemmons, for respondents.

Graves & Englehart, for appellants.

DUNBAR, J.—This is an action brought in the superior court of Kittitas county, involving the right to the use of the waters of Wilson creek and Dry creek. The plaintiffs and intervenor (who claims through the plaintiffs) claim

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the first right to the use of the waters of Wilson creek, by virtue of appropriation through riparian rights. The plaintiff Carl A. Sander settled upon the land, through which the waters of Wilson creek flow, in April, 1871, with the intention of obtaining title thereto, pursuant to the preemption laws of the United States, and thereafter on the 1st day of September, 1871, he made filing upon, and application for, said land, pursuant to said preemption laws, and thereafter continuously resided upon and cultivated said lands, in compliance with said laws, until the 1st day of May, 1874, when he made final proof and payment for said land, and applied for letters patent therefor, and patent was issued to him by the government of the United States on the 10th day of February, 1875.

Plaintiffs allege in their complaint, that said Carl A. Sander has ever since been in possession of said lands, and been the owner thereof, except as to the interest conveyed to the intervenor, and that he has continuously cultivated it; that other parties, mentioned in the complaint, had obtained title to a portion of the land irrigated by said waters, and had, in due course, conveyed the same to plaintiff Carl A. Sander; and that he had irrigated the whole tract of land from the waters of said Wilson creek, which flow naturally over his land, until the same was diverted by the action of the defendants in lowering the head of Dry creek, a creek which separates from Wilson creek about six miles above the land of the plaintiffs. The plaintiffs, respondents here, make no claim to the waters which naturally flow down Dry creek, but their action is based wholly upon the claim that the head of Dry creek has been enlarged by artificial means, so that more water flows down Dry creek than would naturally flow therein; while it is contended by the defendants that about half the water

flowing in Wilson and Dry creeks, together, naturally flows down Dry creek, and that the head of Dry creek has not been lowered so that more than its natural share of water comes down through it. This is the main contention in the case.

The answer is exceedingly long, and the court sustained a demurrer to the second, fourth, and fifth affirmative defenses, set up in the first answer of defendants, to which rulings the defendants excepted, and stood upon their defenses. There is no argument in appellants' brief upon this branch of the case, and it is a little difficult to understand their objections to the action of the court in sustaining the demurrer. But we judge, from the first affirmative defense, and from the cases cited by appellants to sustain their contention that the court erred in sustaining the demurrer, that the contention is that there was a defect of parties defendant.

The answer set up the fact that the waters of Dry creek have been continuously used upon lands other than the lands of the appellants, for beneficial purposes, and that many of these owners have not been made parties to this proceeding, and the answer asks that all the parties interested, or that use or claim rights to said waters, be made parties hereto, so that the rights of all persons interested may be determined in this suit—setting forth the names of the parties interested, so far as known. The cases of *Ralph v. Lomer*, 3 Wash. 401, 28 Pac. 760, and *Hannegan v. Roth*, 12 Wash. 695, 44 Pac. 256, do not throw much light on the subject under discussion. In *Ralph v. Lomer* it was simply held that the question of a defect of parties plaintiff in an action, not having been raised in the court below, would not be considered in the appellate court. The same proposition was asserted in *Hannegan v. Roth*, *supra*,

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but, in addition, it was said there that the rights of the respective parties respondent were not so dependent upon, or united with each other, that separate relief might not be granted in favor of one or more of them. And in this case, if the allegations of the answer are true, there is nothing to prevent the court passing upon the rights of the litigants before it. At least, the decree in this case, not running against the defendants suggested in the answer as proper parties defendant, would not in any way prejudicially affect the rights of the appellants. The object of the complaint was to determine whether the appellants should be enjoined from the wrongful diversion, from Wilson creek, of a portion of its waters, and the determination of this question does not, in any measure, hinge upon the question as to whether or not other parties may or may not have been diverting said waters from their proper use. Besides, the answer does not allege that these third parties were making any claim to the waters of Wilson creek, or were at that time using them adversely to the respondents; and, if this were not shown, the respondents would have no cause of action to enjoin these parties, no matter what they may have done in times gone by.

The fifth affirmative defense, to which a demurrer was sustained, was an allegation that the Yakima Valley, in which the land described is situated, was a dry and arid country, and that artificial irrigation was necessary to its cultivation; and alleged a custom that had given to the first appropriators of the waters of a stream for beneficial purposes the first and prior and better right to use the waters so appropriated; and that, declaratory of these uses and customs, the legislature of the territory of Washington, at their session in 1873, passed an act which applied to Yakima County, wherein it was declared that, in all con-

troversies affecting the right to water in the county of Yakima — whether for mining, manufacturing, agricultural, or other useful purposes—the rights of the parties should be determined by the dates of the appropriation respectively. This defense was an immaterial one, under the decision of this court in *Benton v. Johncox*, 17 Wash. 277, 49 Pac. 495, 39 L. R. A. 107, 61 Am. St. 912, where it was held, in construing this section of the statute set forth in the answer, that the doctrine of appropriation applied only to public lands, and that when such lands ceased to be public and became private property, it was no longer applicable, and that it did not apply as against rights which had become fixed prior to the act. It would not be important in this case in any event, because the appellants disclaim any right to any of the waters except those which naturally flow down the bed of Dry creek, and the respondents make no claim to such waters; the whole controversy in this case being over the question of whether or not the head of Dry creek had been lowered or raised, so that in one instance more than the just proportion of water would flow down Dry creek, and in the other more than a just proportion of the whole volume would flow down Wilson creek. This was the theory upon which the case was tried.

No error was committed by the court in sustaining the demurrer to the sixth affirmative defense, for the matters therein stated would not, under any circumstances, constitute an estoppel. An examination of the testimony in this case convinces us that it overwhelmingly supports the findings of the court in every essential particular, and that the amount of water which naturally flows down Wilson creek has been decreased by lowering the head of Dry creek. A particular discussion of the testimony would not be beneficial.

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It is also insisted by the appellants that the decree, as rendered, is too indefinite and uncertain. The decree provides, "That the plaintiffs and intervenor are entitled to the perpetual use of, and to have the perpetual flow of, the waters of Wilson creek, through said Wilson creek down to the head of their ditches in Wilson creek, on the lands of plaintiffs, of 1,300 inches of water, measured under a four-inch pressure according to the custom of miners; that they are hereby declared to be the owners of the right to use said water, and their title thereto, as against the defendants herein, and each of them, is hereby quieted; that their right to such use is as follows: The intervenor is entitled to the use of the first 225 inches of said amount, and the plaintiffs to 1,075 inches of said amount."

It seems to us that this decree is definite and certain as to the amount of water which is to be decreed to the use of the respondents. The decree makes other provisions, which it is not necessary to mention, for the purpose of carrying out the main provisions of the decree, and enjoins the appellants from in any manner interfering with the waters of Wilson creek so as to prevent in any manner a full flow of 1,300 inches of the waters of Wilson creek—being such as naturally flow therein—from coming down to the lands of the respondents, and from in any manner interfering with the banks of Wilson creek; and further provides, "that, at any time the defendants, or either of them, deem themselves or himself able to show that with the bed and banks of Wilson creek, at the head of Dry creek, in the condition aforesaid [that is, the condition specified by the decree], there will flow a greater amount of water down to the lands of plaintiffs than is necessary to supply and furnish the plaintiffs and intervenor with 1,300 inches of water, then said defendants or defendant shall have the right to move

the court to modify this decree, so as to permit them to have the right to divert any such surplus into Dry creek, to use for any beneficial purpose."

It seems to us, not only that this is a definite decree, but that it is a just one, looking to the interests of both respondents and appellants in the action. Of course, it is more or less of an onerous duty, that is imposed upon the appellants, to ask for a modification of the decree when circumstances warrant it, but it is a duty that is necessarily imposed by conditions existing. The exact and just distribution of water is ordinarily a difficult matter to determine, but we think it has been determined in this case with as much exactness as the circumstances proven will admit.

The judgment is affirmed.

FULLERTON, C. J., and HADLEY and MOUNT, JJ., concur.

[No. 4959. Decided April 12, 1904.]

HANNE JENSEN LOGSDON, *Respondent*, v. SUPREME LODGE
OF THE FRATERNAL UNION OF AMERICA, *Appellant*.¹

INSURANCE — BENEFICIAL ASSOCIATIONS — PAYMENT OF DUES — DATE OF ISSUANCE OF CERTIFICATE — CONSTRUCTION OF CLAUSE IN CONSTITUTION. Where a clause in the constitution of a beneficial society provides that a member shall be liable for the month in which his certificate is "issued or dated," but another clause provides that there shall be no liability on the part of the society until the Degree of Fraternity is conferred, one assessment paid, and the certificate is delivered and "accepted in writing," a certificate is not "issued" when signed and dated, nor until it is delivered, since the relations between the member and the association are contractual and the obligations must be mutual; hence under a certificate dated and signed August 12, but not delivered until September 2, at which time the first assessment was paid, and the degree conferred, there is no liability for dues for the month of August.

¹Reported in 76 Pac. 292.

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Opinion Per HADLEY, J.

SAME—APPLICATION OF DUES. In such a case, it would be immaterial that the payment had been applied by the association to dues for the month of August, and that another payment had been made in September in advance, since the defense of forfeiture is not available as long as sufficient funds of the member were timely received to meet his assessments.

SAME—CONSTRUCTION—FORFEITURES NOT FAVORED. All the provisions respecting dues in benevolent associations must be construed together, and, as forfeitures are not favored, doubtful language will be construed in favor of the insured to avoid a forfeiture.

Appeal from a judgment of the superior court for Whatcom county, Neterer, J., entered July 13, 1903, upon findings in favor of the plaintiff, after sustaining a demurrer to the answer, in an action upon a certificate of fraternal insurance. Affirmed.

Willis B. Herr (Allen & Webster, of counsel), for appellant.

Virgil Peringer, for respondent.

HADLEY, J.—Respondent is the beneficiary named in a fraternal insurance certificate issued by the appellant corporation to one Charles C. Jensen, who is now deceased. Payment having been refused, this action was brought to enforce recovery. A demurrer to the complaint was overruled. An affirmative answer thereafter interposed was, on motion, stricken, and the appellant refused to plead further. The court then made findings of facts and conclusions of law, and entered judgment in favor of respondent for \$1,012, with interest and costs. This appeal is from the judgment.

No exceptions were taken to the findings of facts, and the assigned errors which are urged relate to the rulings upon the demurrer and motion to strike, and also to the conclusions of law. It is first contended that the court

erred in overruling the demurrer to the complaint. The allegations of the complaint, including exhibits attached thereto, are extensive, and it is impracticable to set them forth here in detail. The complaint, however, shows that on the 3d day of September, 1901, the deceased was initiated as a member of New Whatcom Lodge, No. 143, a local and subordinate branch of the appellant corporation; that at said time there was conferred upon him what is called the "Degree of Fraternity;" that, prior to the said date, he had paid all admission fees, together with fees for certificate, and supreme medical and local physician's examination; that on said date he paid to the secretary of said local lodge one dollar to apply on his first assessment, and also fifteen cents per capita tax, and twenty-five cents local lodge dues; that on the preceding day, September 2, 1901, the benefit certificate was delivered to him, and he accepted the same in writing; that on the 9th day of September, 1902, he died, and prior to his death had paid to the appellant twelve assessments of one dollar each, twelve monthly payments of per capita tax of fifteen cents each, and twelve monthly payments of local lodge dues of twenty-five cents each. It is alleged that said twelve payments, aggregating \$1.40 each, were made for the twelve consecutive months beginning with September, 1901, and ending with August, 1902.

The complaint further shows that the constitution of the appellant corporation provides that each member, when he takes his Degree of Fraternity and receives his benefit certificate, shall pay to the secretary of his lodge, in addition to one month per capita tax and local dues, one assessment according to his age when applying for membership, which, in this instance, was one dollar; that the constitution further provides that each member of the order shall pay one assessment per month according to the rate named in his

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certificate, which shall be paid to the secretary of the subordinate lodge of which he may be a member, on or before the last day of each month, and, if not so paid, the beneficiary certificate shall become null and void. The following further provision of the constitution also appears by the complaint:

"Every member shall be liable for dues as required by his lodge, one assessment and fifteen cents per capita tax for the month in which his benefit certificate was issued or dated by the supreme secretary; provided, the same is issued prior to the twenty-first day of the month, and all certificates issued after the twentieth day of the month the assessment and per capita tax shall be credited to the following month. Said assessment, dues and per capita tax shall be payable at the time of delivery of the benefit certificate or said certificate shall remain null and void and of no effect."

The principal contention upon the demurrer, and in fact in the whole case, hinges upon the construction that shall be given to the above quoted extract, in its application to the facts of this case. It will be seen, from what has been said as to the allegations of the complaint, that, if the obligation to make the first payment of assessment and dues did not accrue until the month of September, 1901, then the twelve payments which were afterwards made included the month of August, 1902. If the payments should be so applied, it follows that the payment for September, 1902, was payable at any time before the end of that month, and inasmuch as the member died on the 9th day of September, there was no default.

The benefit certificate appears to have been signed by the supreme officers of the appellant corporation, at Denver, Colorado, on the 12th day of August, 1901. Inasmuch as the last mentioned date was in the month of August, and prior to the 21st of said month, appellant contends that,

under the above quoted constitutional provision, the deceased was liable for an assessment for that month. If he was so liable, and if the first payment should be applied to August, 1901, it follows that none of the twelve consecutive payments which were made applied to any month after July, 1902, and the following month of August wholly passed without any payment. It is upon this point that appellant seeks to evade liability, and to defeat recovery.

Emphasis is placed upon the fact that the quoted constitutional provision says that a member shall be liable for the month in which his benefit certificate is "issued or dated." It will be observed, however, that a proviso immediately follows to the effect that such liability accrues only when the certificate is "issued" prior to the 21st day of the month. A certificate cannot be said to be issued, when it is merely dated and signed by appellant's officers. It is not issued until it becomes vitalized as the evidence of a binding mutual obligation. It does not become such until it has been delivered to, and accepted by, the member. In that particular it is analogous to a deed, which does not become a deed until it is delivered, even though that may be long after its date.

The relation between the member and appellant must be construed as a contractual one. Appellant suggests that the relation is not that of mutual obligation, since the member is not bound to pay unless he chooses to do so. Appellant agrees, however, that, if the member does pay, it shall be bound. It accepts his payment as a consideration for such binding obligation, and its liability does not arise until payment has been made. When the member pays, he does it for a consideration, which is the agreement of appellant to pay benefits. A contract must be

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mutual, and until all conditions are such that appellant is bound to pay benefits, there is no contract. Appellant now insists that a payment made and accepted in the month of September, 1901, should be applied to the prior month of August, notwithstanding the fact that, if the member had died during said month of August, appellant would not have been bound. It would not have been bound, for the reason that its constitution expressly provides that it shall not be liable for a payment of benefits until the Degree of Fraternity is conferred upon the member, until one assessment and one monthly per capita and dues are paid, and until the benefit certificate has been delivered to him, and its terms accepted in writing on the face thereof.

We have already seen that the certificate was not delivered and accepted until the 2d day of September, 1901, and the Degree of Fraternity was not conferred, and the assessment paid, until the following day. All these things occurred after the expiration of the month of August, and appellant was not, during that month, liable to pay benefits. When, therefore, the first monthly assessment was paid and received, it must be held to have applied to a month when the appellant itself was bound. Otherwise the member would have received no consideration for his payment, and it would have amounted to a mere gratuity. It is immaterial that another payment was made before the end of the month of September, 1901. The member was entitled to have the payment applied to the month of October, although paid in advance. The same was true of other payments also made in advance, and it is immaterial that appellant itself may have otherwise applied them. As long as sufficient funds of the member to meet the assessments were timely in the hands of appellant, no defense of forfeiture for nonpayment is available. *Elliott v. Grand*

Lodge A. O. U. W., 2 Kan. App. 430, 42 Pac. 1009; *Evarts v. U. S. Mut. Acc. Ass'n*, 16 N. Y. Supp. 27; *Supreme Lodge of Patriarchs v. Welsch*, 60 Kan. 858, 57 Pac. 115; *Knight v. Supreme Council Order of Chosen Friends*, 6 N. Y. Supp. 427; *Demings v. Supreme Lodge Knights of Pythias*, 48 N. Y. Supp. 649; *Margesson v. Mass. Ben. Ass'n*, 165 Mass. 262, 42 N. E. 1132.

If, as appellant contends, the deceased was liable for an assessment for the month of August, 1901, then, under the constitution, as we have seen, it must have been paid before the end of that month, or he was in default. On that theory he was in actual default on the 2d day of September, when appellant delivered to him the benefit certificate. For reasons already stated, however, it seems to us illogical to reason that a default could occur until such a time as there was a completed contract between the parties. If there could be no default, there could be no liability.

Appellant objects to the use of the term "liability," as applied to the member, for the reason that the whole matter is optional with him. Such may be technically true, but the term is commonly used in this connection, and it is the identical one adopted by appellant itself, in its own constitutional provision, above quoted. The term is, of course, not used of the member in the sense that an absolute personal obligation to pay exists, but rather in the sense that, if he would continue appellant's liability, he himself is obligated to pay. We think the complaint clearly states a cause of action, and that the demurrer was properly overruled.

We see no provisions in appellant's constitution that necessarily conflict with our views as expressed, and certainly not when they are all construed together, under the application of ordinary rules governing contracts. The

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case does not seem to us to involve even inconsistent or contradictory questions, suggesting a doubtful relation between appellant and the insured. If it were so, however, it would be our duty to construe the provisions in the contract respecting a forfeiture so as to adopt those most favorable to the insured. Forfeitures are not favored, and, where language is doubtful, courts will adopt that construction which will avert a forfeiture. *National Bank v. Insurance Co.*, 95 U. S. 673; *Franklin Life Ins. Co. v. Wallace*, 93 Ind. 7; *Elliott v. Grand Lodge, supra*; *Modern Woodmen of America v. Jameson*, 48 Kan. 718, 30 Pac. 460; *Miner v. Michigan Mut. Ben. Ass'n, etc.*, 63 Mich. 338, 29 N. W. 852; *Woodmen of the World v. Gilliland*, 11 Okl. 384, 67 Pac. 485. Some general comments in the opinion of the last above cited case we heartily approve, and, because of their seeming appropriateness, we quote them here:

"We believe that the true rule of construction in cases like this is that the court will give to the language such a liberal construction as will tend rather to sustain than to defeat the certificate, consistent with the laws and rules of the order; that beneficiary certificates of insurance, having been designed for the relief of those who are needy and helpless, should not be defeated of their purpose on grounds and for reasons which are purely technical; that a forfeiture will not be enforced unless it is clearly demanded by the rules governing the construction of written agreements. When a policy of insurance contains inconsistent or contradictory provisions, it is the rule that the provisions most favorable to the insured will be adopted. . . . Courts will construe a contract of insurance liberally, so as to give it effect, rather than to avoid it. Conditions which create forfeitures will be construed most strongly against the insurer. Only a stern legal necessity will induce such a construction as will nullify the policy."

The above discussion upon the demurrer to the complaint effectually disposes of the case. We believe the court did not err in striking the affirmative answer, as we think no competent issue was tendered thereby. The findings were, in substance, in accord with the allegations of the complaint, as above stated. There were no exceptions to the findings. The court's conclusions of law were in accord with our views expressed above, and we believe they were not erroneous.

The judgment is affirmed.

FULLERTON, C. J., and MOUNT and DUNBAR, JJ., concur.

[No. 4974. Decided April 12, 1904.]

CLYDE LANDERS, *Appellant*, v. HARRISON G. FOSTER *et al.*,
Respondents.¹

CONTRACTS—EXECUTION—BILL OF SALE TO AGENT OR TRUSTEE—LIABILITY OF PRINCIPAL WHERE AGENCY IS DISCLOSED. Where parties jointly entered into a contract with another, and for convenience provide for the making of a bill of sale to one of their number instead of to each individually, he becomes their trustee, and they can not escape liability upon the theory that he acted as their agent, and that principal and agent being both known to the other contracting party, exclusive credit to the agent released them from liability.

SAME—EVIDENCE BY PAROL TO SHOW AGENCY OF PARTY EXECUTING CONTRACT. Where one of several co-obligors for convenience closes up the contract by taking a bill of sale in his own name, but in fact as trustee for the others, parol evidence is admissible to show who the actual contracting parties were.

CONTRACTS—CONSTRUCTION—CONTINGENCY OF ISSUANCE OF PATENT—PLEADING. Where a payment under a contract was to be made when letters patent were granted upon an invention, the complaint sufficiently shows that the contingency has occurred by an allegation that the commissioner of patents made an order

¹Reported in 76 Pac. 274.

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allowing the patent and directing that a patent issue on the order of the interested parties therefor.

Appeal from a judgment of the superior court for Pierce county, Snell, J., entered April 12, 1903, sustaining a demurrer to the complaint, dismissing an action for damages for breach of contract. Reversed.

E. W. Taylor and *R. H. Lund*, for appellant.

C. M. Riddell, *John A. Shackleford*, and *J. M. Ashton*, for respondents.

DUNBAR, J.—The appellant invented an electric air heating fan, for which he made application to the United States commissioner of patents for a patent. Pending the issuance of the patent, the following agreement was executed between the appellant and one Arthur E. Grafton:

“This agreement, made this 20th day of March, 1901, by and between Clyde Landers, party of the first part, and Arthur E. Grafton, party of the second part, both of Tacoma, Pierce county, Washington, provides:

“FIRST: That in consideration of the sum of one dollar, the receipt whereof is hereby acknowledged, Clyde Landers gives to Arthur E. Grafton an option on a controlling interest (towit: 51 per cent) in an electric device known as an air heating fan, the principle of which is involved completely in a machine now in operation at the Tacoma Hotel Barber Shop, Olympic Club Barber Shop, and various other places in the city of Tacoma, application for the patent of which has been filed with Munn & Co., patent attorneys of Washington, D. C., and the first payment of \$25 for which has been made and acknowledged. Said option to last and bind fast said Clyde Landers until Monday at 2 P. M. March 25th, 1901.

“SECOND: That if the said Arthur E. Grafton secures and pays to Clyde Landers on or before the date and hour specified the sum of one thousand (1000) dollars, then this shall be accepted by Clyde Landers as a portion of the pur-

chase price of 51% interest in the above described application for patent for which has been made.

"THIRD: Said Clyde Landers agrees that upon payment of the above mentioned \$1000 he will absolutely refuse and cease to consider any offer or proposition to sell, lease or dispose of any further interest in the device or to manufacture or offer for sale, any of the machines using the principle of this air heating fan.

"FOURTH: That as soon as a patent shall have been regularly issued by the patent office at Washington, D. C., then shall be paid to Clyde Landers the further sum of \$4000 which shall be full and complete payment for this 51% interest in the title and patent aforesaid air heating fan. If no patent is issued, no recourse shall be made on Clyde Landers for the first payment of \$1000.

"FIFTH: The purchaser of this 51% interest must agree to organize a non-assessable corporation and issue to Clyde Landers 49% of the capital stock. As a further consideration Clyde Landers agrees to invent and furnish free of charge to the corporation which shall be formed as above described, all devices and improvements which he shall invent or make for a period of ten years from date of this above described invention, provided that said corporation shall stand all costs and expenses of experiments and improvements and regularly employ said Clyde Landers at a salary to be agreed upon, not to exceed two hundred dollars per month."

On March 25, 1901, the date on which the option of Graf-ton expired, according to the complaint, the respondents, for the purpose of securing and carrying out the terms of the said option, entered into a contract which is stated in appellant's amended complaint as follows:

"(1) That prior to the — day of March, 1901, the plaintiff herein invented a certain 'electric air heating fan' and thereupon made application to the commissioner of patents of the United States, in Washington, D. C., for the issuance of a patent thereon.

"(2) That afterwards and on the 5th day of March, 1902, the said commissioner of patents at Washington, D. C.,

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according to the specifications referred to in plaintiff's exhibit 'B' hereto attached, duly made an order allowing the said patent so applied for on the said 'electric air heating fan' and then and there directed that a patent issue therefor on the order of the parties applying therefor, or their successors or assigns.

"(3) That after said patent had been applied for and before the same had been allowed, and on or about the 25th day of March, 1901, plaintiff herein entered into an agreement with the defendants, by the terms of which agreement plaintiff agreed to sell, and the defendants agreed to purchase from plaintiff 51% of the said device.

"(4) That at the time of the making of the said agreement, it was agreed by the defendants and the plaintiff in part consideration of the sale and the transfer to them of the said 51% of the said 'electric air heating fan' that then the defendants on their part would pay, or cause to be paid to the plaintiff, the sum of \$5,000, \$1,000 to be in cash in hand and the sum of \$4,000 to be paid to the said Clyde Landers by the defendants as soon as a patent should be regularly granted by the commissioner of patents at Washington, D. C. All of which is more fully set forth in a certain memoranda and agreement made and entered into on the 5th day of March, 1901, by and between the defendant Arthur E. Grafton and the plaintiff, giving to the said Grafton an option for the purchase of the said 51% of the said device; and the said Grafton then and there agreeing within the time specified to secure and pay to the plaintiff herein the said several sums of money therein designated and in pursuance thereof and in accordance with the terms of the said option and agreement, the said defendants and all of them accepted and approved the terms of the said agreement, and then and there on the 25th day of March, 1901, agreed to and with the plaintiff herein that in consideration of the transfer to them of the said 51% as set forth in the said option, that then they, the defendants, and each of them would perform or cause to be performed each and every of the terms of said agreement and fulfill its conditions and particulars, and in particular to pay to the plaintiff the sum of money as therein

stated. And then and there did pay to the plaintiff the sum of \$1,000 in accordance with the terms of the said option. A copy of the said agreement is attached hereto and marked exhibit 'A' and incorporated in and made a part of this complaint for a more full and complete statement of the conditions therein.

"(5) That on the 25th of March, 1901, plaintiff herein, for the further purpose of carrying out said agreement and contract, and under the direction of and at the request of the defendants herein, made and executed to the defendants in the name of Harrison G. Foster, who was by the defendants nominated as representative of the said defendants herein, a bill of sale, wherein and whereby he conveyed to the said defendants in the name of the said Harrison G. Foster, their trustee, and who was by the said defendants nominated and designated to accept and receive the said conveyance, the 51% interest in and to the said invention known as an 'electric air heating fan,' and for which the said patent had theretofore been applied for, and by the terms of which bill of sale the commissioner of patents at Washington, D. C., was authorized and directed to issue the said letters patent for the said 'electric air heating fan' to the said Harrison G. Foster, and to the said Clyde Landers, jointly, 51 per cent thereof, and 49 per cent thereof to the said Clyde Landers. All of which is more fully set forth in that certain bill of sale, executed March 25, 1901, by the plaintiff herein to the said Harrison G. Foster, a copy of which is hereto attached and marked exhibit 'B' and to which reference is hereby made, and incorporated and made a part of this complaint. That at the time the agreement marked exhibit 'B' was executed the plaintiff knew that the said Foster was acting for and on behalf of the defendants.

"(6) That no part of the said \$5,000 has been paid by the said defendants except the sum of \$1,000 which was paid at the time of the making of said agreement, March 25, 1901, leaving a balance wholly unpaid and long past due upon the said contract in the sum of \$4,000, together with interest thereon at legal rate from the 5th day of March, 1902, the date when the said patent was allowed;

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for which sum the plaintiff has requested and demanded but the defendants and all of them have failed, neglected and refused to pay any part thereof."

The complaint further sets forth a second cause of action, viz., the failure of the respondents to organize and conduct the business as alleged in the first part of the complaint; and a third cause of action, viz., the reasonable value of appellant's services in and about the manufacture of the said implements, which is alleged to be \$150 per month; with the other necessary allegations. Judgment was demanded, (1) for the sum of \$4,000 alleged to be due on account of the sale of fifty-one per cent of the said "electric air heating fan;" (2) that appellant have and recover against the respondents judgment for \$5,000 damages sustained by reason of the failure of the respondents to perform their contract to organize a corporation and conduct and carry on the business of said "electric air heating fan;" and (3) for the sum of \$1,350 for failure of respondents to employ appellant, as agreed upon in the said contract, since the 1st day of March, 1902; amounting in all to the sum of \$10,350, together with interest on \$4,000 thereof at the legal rate from the 5th day of March, 1902, and for appellant's costs and disbursements expended.

Service of summons was had upon all of the respondents, with the exception of Harrison G. Foster and ——— Smith, who are nonresidents and out of the jurisdiction of the court. The respondents appeared by separate attorneys, and filed general demurrers to the amended complaint. The court sustained the demurrers. The appellant elected to stand upon the amended complaint, judgment was entered dismissing the cause, and for costs of suit, and appeal taken.

We are unable to determine upon what theory the de-

murrers were sustained. It is asserted by the respondents, that, where an agent contracts in his own name, but his principals are disclosed and are known by the other party, the creditor cannot hold both the principals and the agent liable, and the taking of a note or written agreement to pay, signed by the agent as an individual, will constitute an election to treat the sale as made on the credit of the agent; that, in such a case, the maker of the agreement to pay cannot release himself from liability by showing that he acted as an agent for others; citing, *Shuey v. Adair*, 18 Wash. 188, 51 Pac. 388, 39 L. R. A. 473, 63 Am. St. 879. But, while this may be true, we hardly see its applicability to the case in point. Assuming Foster to be an agent, he is not here asking to be exonerated from responsibility, or released from the liability growing out of the agreement. This was what was decided in *Shuey v. Adair*, *supra*, viz.: that, in an action by a holder against the maker of a promissory note, the latter cannot, on the ground that he executed the note as an agent, require the alleged principals to be made party defendants, and escape liability himself.

Appellant cites, as directly in point, *In re Bateman*, 28 N. Y. Supp. 36. But all that that case holds is that, if the contracting party knew the principal at the time of the contract, and yet chose to engage with the agent, he is estopped afterwards to go against the principal, but that he may pursue an undisclosed principal. But there is no question in this case of undisclosed principals, for the complaint alleges, and the demurrer confesses, that the contract in this case was entered into with all of the respondents; that they agreed to and with the appellant that, in consideration of the transfer to them of the said fifty-one per cent, as set forth in the said option, they—the respondents—and

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each of them, would perform, or cause to be performed, each and every of the terms of said agreement, and fulfill its conditions, etc., and that, for the purpose of carrying out said agreement and contract, and under the direction of and at the request of the respondents herein, the appellant made and executed to respondents, in the name of Harrison G. Foster—who was by the respondents nominated as their representative herein—the bill of sale, etc.; that the respondents constituted, for this purpose, the said Harrison G. Foster their trustee, nominated and designated by them to accept and receive the conveyance. Our statute makes the requirement of a complaint a plain statement of facts constituting the cause of action. Here is a plain statement of facts, the facts being that these respondents, not through their agent, but in their own proper persons, entered into this contract with the appellant, simply (presumably for convenience) providing for the making of the bill of sale to one of their number, instead of to each individually. If it were held that, under such circumstances as these, parties making the contract could escape liability because the business was to be done through a trustee, all contracts of a trust nature would be seriously endangered.

The authorities cited by the appellant seem to us to be cited under a misapprehension of the principles involved. They are all cases where the transaction was with the agent, instead of with the principal, and questions arose in those cases as to whether the principals had been released from liability by reason of credit given to the agent. Thus, Story on Agency (9th ed.), § 447, cited by respondents, is to the effect that, "The exceptions to this liability of the principal may easily be gathered from what has been already stated. If the principal and agent are both known, and exclusive credit is given to the latter, the principal

will not be liable, although the agent should subsequently fail; for it is competent for the parties to agree to charge one, exonerating the other; and an election, when once made, becomes conclusive and irrevocable." But the preceding section, 446, states that, "The fact that the agent has contracted in his own name in writing, yet with the assent of his principal, and for his benefit, will not exclude the principal from liability, unless exclusive credit is given to the agent." And so with all the other cases cited, although in *Hill v. Miller*, 76 N. Y. 32, exactly the opposite doctrine is announced, for there it is said:

"It is also urged that the contract was not properly executed. It is signed 'Thos. Mills, agent, for P. R. Miller.' Such a contract if actually made in pursuance of authority may be signed by the agent in his own name, and the principal will be liable;"

citing *Briggs v. Partridge*, 64 N. Y. 357, 21 Am. Rep. 617, and *Dykers v. Townsend*, 24 N. Y. 57.

But here, if the allegations of the complaint be true—and such allegations, if well pleaded, are confessed by the demurrer—there is no question of contracting with an agent, but the contract was made directly with the respondents. So that the only possible question that could be raised was, whether or not, the agreement having been made in the name of Foster, parol testimony could be introduced to show who the actual contracting parties were. And we think that such has been the law from time immemorial. So far back as *Trueman v. Loder*, 11 Adolp. & Ellis 178, it was said that parol evidence was always necessary to show that the party sued was the person making the contract, and bound by it.

"Whether he does so in his own name," said the court, "or in that of another, or in a feigned name, and whether the contract be signed by his own hand or by that of an

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agent, are inquiries not different in their nature from the question who is the person who has just ordered goods in a shop. If he is sued for the price, and his identity made out, the contract is not varied by appearing to have been made by him in a name not his own."

See, also, *Dykers v. Townsend, supra*; *Briggs v. Munchon*, 56 Mo. 467.

It is also contended by the respondents that, under the terms of the agreement pleaded, the sum of \$4,000 was to be paid when letters patent were granted for said invention, and that the complaint does not allege that letters patent have ever been granted; that the allowance of a patent, and the direction that it be issued, is a very different matter from the granting and issuing of a patent. But we think this criticism of the complaint is hypercritical. The complaint alleges, "that afterwards and on the 5th day of March, 1902, the said commissioner of patents, at Washington, D. C., according to the specifications referred to in plaintiff's exhibit 'B' hereto attached, duly made an order allowing the said patent so applied for on the said 'electric air heating fan' and then and there directed that a patent issue therefor on the order of the parties applying therefor, or their successors or assigns." The patent office had done all that it was required to do until the patent was called for by the parties entitled to it, and we think that this brings the case fairly within the contemplation of the contract that the money was to be paid when the patent was issued.

The complaint states a good cause of action, and the judgment is therefore reversed and the cause remanded, with instructions to overrule the demurrers to the complaint.

FULLERTON, C. J., and HADLEY and MOUNT, JJ., concur.

[No. 4990. Decided April 14, 1904.]

34 684
38 687

MATILDA BORROW, *Appellant*, v. FRED BORROW *et al*,
***Respondents*.¹**

APPEAL—REVIEW—FINDINGS ON CONFLICTING EVIDENCE. Where there is decided conflict on material points, the trial court's decision as to the weight of the evidence should not be disturbed, where the trial court saw and heard the witnesses.

VENDOR AND PURCHASER—ADVANCEMENT OF PRICE FOR BENEFIT OF ANOTHER—RESULTING TRUST—DEED AS A MORTGAGE. Where a daughter advanced the price, \$1,800, for premises purchased by her parents, taking a deed in her own name, under an oral agreement whereby they agreed to repay the purchase price within two years, with \$15 per month as compensation for the loan, she occupies the double position of trustee of a resulting trust and mortgagee, holding the title for her parents and as security for the amount advanced.

SAME—STATUTE OF FRAUDS—PAROL EVIDENCE. Such a resulting trust is excepted from the operation of the statute of frauds and may be proved by parol evidence, where there is mutual obligation to pay and receive the money advanced.

SAME—PART PERFORMANCE—POSSESSION AS TENANTS. The fact that the purchasers were in possession as tenants of the former owner at the time of the agreement can not be urged to show that there was no taking of possession amounting to part performance to take the case out of the statute of frauds, where it further appears that, relying upon their agreement, the parties purchased and paid for an adjoining lot for use in connection with the premises, made improvements on the premises, and paid interest on the loan, such expenditures and change in the situation creating an equitable estoppel against the plea of the statute of frauds requiring contracts for the purchase of real estate to be in writing.

SAME—AGREEMENT NOT TO BE PERFORMED WITHIN ONE YEAR. Such a trust relation and part performance defeats the claim that the agreement was an oral contract not to be performed within one year.

Appeal from a judgment of the superior court for Kittitas county, Rudkin, J., entered April 21, 1903, upon the

¹Reported in 76 Pac. 305.

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Opinion Per HADLEY, J.

findings and decision of the court in favor of defendants, after a trial on the merits, dismissing an action to enjoin the defendants from building upon premises claimed by the plaintiff. Affirmed.

Mires & Warner and *Graves & Englehart*, for appellant, to the point that where the vendees are occupying the premises there is no such taking of possession as to take the case out of the statute of frauds, cited: *Swales v. Jackson*, 126 Ind. 282, 26 N. E. 62; *Johnston v. Glancy*, 4 Blackf. 94, 28 Am. Dec. 45; *Rucker v. Steelman*, 73 Ind. 396; *Arnold v. Stephenson*, 79 Ind. 126; *Brawdy v. Brawdy*, 7 Pa. St. 160; *Christy v. Barnhart*, 14 Pa. St. 260, 53 Am. Dec. 538; *Birkbeck v. Kelly* (Pa.), 9 Atl. 313.

Pruyn & Slemmons, for respondents.

HADLEY, J.—Respondents are husband and wife and appellant is their daughter. Appellant brought this suit against respondents and alleged, that she is the owner of the north half of lot 1, block 22, in the original town of Ellensburg; that the respondents were the tenants in possession under appellant's grantor, at the time the appellant purchased the property, and have since continued in occupancy thereof as appellant's tenants; that appellant has a brick building upon a portion of said lot, and respondents have commenced the construction of a wooden building upon the lot, connecting with said brick building, and made other changes in appellant's building, are continuing and threatening to continue to complete the construction of said wooden building and to make other changes in the brick building, against the protest of appellant. It is alleged that respondents are insolvent and that damages are not recoverable, for which reason a restraining

order is prayed to prevent respondents from doing further building, or making further changes upon the premises.

The respondents answered that, during the month of June, 1902, they were desirous of purchasing the premises described in the complaint, and obtained from the agent of the owner the price and terms upon which they could be bought, the same being \$1,800 cash, or \$1,850 part cash and part on time; that respondents agreed to buy the property, and the agent agreed to sell the same to them, and also agreed that respondents could have a short time to determine whether they would pay cash in full or purchase on the deferred payment plan; that, on or about July 6, 1902, the appellant, having ready money and knowing of the desire and intention of respondents to purchase said premises, and knowing of their agreement to purchase the same as aforesaid, did, at the request of respondents, agree with them to purchase the premises for respondents at the cash price of \$1,800, to take the deed therefor in her own name, and give the respondents two years' time in which to pay her the \$1,800 purchase price, together with \$15 per month as compensation for the use of the money, and that she would then convey the premises to them; that, in pursuance of said agreement, appellant paid said purchase price and received a deed for the premises, in which she is named as grantee; that, upon the faith of said agreement with appellant, respondents went into possession of the premises, and have since occupied and retained possession thereof, making valuable improvements thereon; that they have paid appellant the sum of \$60 as compensation for the use of said \$1,800. The answer contains many other allegations, but the above, we believe, sufficiently state the issue.

A trial was had before the court without a jury. The court made findings of facts and entered conclusions of

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law to the effect, that the deed, conveying the premises to appellant, was intended as a mortgage, and is a mortgage, to secure the sum of \$1,800 loaned by her to respondents, with interest thereon; that appellant holds the legal title in trust for respondents; and that the latter are entitled to a judgment dismissing the action. Judgment was entered accordingly, and this appeal was taken.

Errors are assigned upon the court's findings of facts. We have read and considered the evidence. There is decided conflict in the testimony upon material points. The trial court, however, found the weight thereof to be with respondents. We do not think the record will justify us in finding otherwise, especially in view of the fact that the trial court saw and heard the witnesses testify, and was therefore better able to determine the relative value of conflicting testimony. The facts found by the court are substantially the same as alleged by the respondents in their answer, and as heretofore stated.

It is next assigned that the court erred in its conclusions of law. The proofs showed that the agreement between appellant and respondents, requiring the conveyance to appellant as security for the loan of the \$1,800, was not in writing. It is therefore urged that the transaction was within the statute of frauds, and that no acts of the parties have taken it without the statute. It is further contended that the transaction was within the statute declaring a contract void when not in writing, and when, by its terms, it is not to be performed within one year from the time it is made. It is a well established rule that parol evidence is admissible to show that an instrument, though in form a deed, is in fact a mortgage. It is also the rule when, by verbal agreement, the purchase money for real estate is paid by one person and the conveyance is made to another, that a resulting trust arises against the person to whom

the land is conveyed, in favor of the one by whom the purchase money is paid. The same rule applies when the money is merely advanced as a loan by the party taking the title.

"The same rule prevails if the money paid by the party taking the title is advanced by him as a loan to the other, and the conveyance is made to the lender for the purpose of securing the loan. But in the latter case the purchaser cannot demand the conveyance until he has paid the money advanced, and for which the land is held as security. In such a case the grantee holds a double relation to the real purchaser, he is his trustee of the legal title to the land and his mortgagee for the money advanced for its purchase, and, as in the case of any other mortgage which is evidenced by an absolute deed, is entitled to retain the title until the payment of the claim for which it is held as security; and he may also enforce his lien by an action of foreclosure. The conveyance is none the less a mortgage because it was conveyed to him directly by a third party, to secure his loan to the purchaser for the amount of the purchase-money, than if the conveyance had been made directly to the purchaser in the first instance, and the purchaser had then made a conveyance to him as a security for the money that he had previously borrowed with which to make the purchase. He is regarded as holding the land in trust for the protection of the purchaser, but this rule is not to be so extended as to enable the purchaser to work him an injury." *Campbell v. Freeman*, 99 Cal. 546, 547-8, 34 Pac. 113.

That such a resulting trust, arising by implication, is excepted from the operation of the statute of frauds, and may be proved by parol testimony, is declared in *Boyd v. M'Lean*, 1 Johns. Ch. 582. The early decisions upon the subject are there generally reviewed and discussed. This principle is fully recognized and the above case approved in *Getman v. Getman*, 1 Barb. Ch. 499, cited by appellant here. The court, however, refused to apply the principle

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in that case for the reason that, while there was an agreement upon the one part to sell and convey to those who asserted the existence of a resulting trust, yet there was no agreement upon their part that they would take the property and pay the amount advanced, or even the interest thereon. It was held, therefore, that the agreement had no consideration to support it, even if it had been reduced to writing, and that it created neither a contract nor a trust which took it out of the operation of the statute of frauds. There is no such lack of mutual consideration in the case at bar, and we think a resulting trust was created.

The respondents had possession of the land from the time of the purchase. They had, however, been in possession as tenants of the former owner, and appellant contends that there was therefore no taking of possession under the contract, amounting to part performance, which takes the case without the statute of frauds. The authorities cited by appellant sustain the view that mere continuance of possession, when one is already in occupancy, is not of itself a part performance.

Each case must, however, be controlled by its own circumstances, and the evidence shows the following circumstances in this case: Respondents, relying upon their said agreement with appellant, purchased an adjoining lot and paid their own money therefor. It is clear from the evidence that they would never have made this expenditure if they had not relied upon said agreement. They desired to own and control it, so as to prevent others from building in such proximity to the aforesaid adjoining structure as would darken the windows thereof. It is also clear that they valued this adjoining lot only for its convenient use in connection with the other, and paid a much larger sum for it than they would otherwise have done if they had not relied upon their agreement with appellant. Expendi-

tures were then made by respondents for improvements upon said building, the expenditures having reference to the changed situation occasioned by the purchase of said adjoining lot. Compensation for the money loaned was also paid by respondents, and received by appellant. The acts of the parties, we think, were clearly referable to their contract, were done in pursuance of that agreement; and appellant, knowing thereof, acquiesced therein at the time. It is the rule that acts relied upon to show part performance must have been done in pursuance of the agreement, and be referable to that alone. 2 Warvelle, Vendors, p. 786. Touching the scope of the above stated rule, the court, in *Brown v. Hoag*, 35 Minn. 373, 29 N. W. 135, 137, says:

"It may be well, at this point, to correct what we deem misapprehensions on part of appellant as to the meaning and application of certain familiar rules governing this subject of part performance. He invokes the rule that acts relied on as part performance must be referable to and done in pursuance of the contract, and seems to assume that this includes only acts which were *stipulated* to be done in the contract itself, and as a part thereof. We do not understand this to be the law. While the phrase 'part performance' is commonly used as a short and convenient statement of the general ground upon which verbal agreements regarding real estate are enforced, yet the whole doctrine rests upon the principle of fraud, and proceeds upon the idea that the party has so changed his situation, on the faith of the oral agreement, that it would be a fraud upon him to permit the other party to defeat the agreement by setting up the statute. Hence the term 'part performance' falls far short of expressing the whole doctrine and theory of courts of equity in this matter. The change of situation necessary to create this equitable estoppel, must, of course, have been made in reliance upon, and in pursuance of, the oral agreement, and so connected with the performance of the contract that, from

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the nature of the case, the defendant should understand it was done in reliance upon his agreement. The acts done must be related to and connected with the contract, and the defendant's performance of it. The plaintiff must show that in reliance on the contract, he has proceeded, either in *performance* or *pursuance* of it, to so far alter his position as to incur 'an unjust and unconscientious injury and loss' in case the defendant is permitted to rely upon the statutory defense. But this change of situation is not confined to doing what the contract *stipulated*; that is, 'part performance,' strictly so called."

We think, within the comprehensive rule stated above, that such a change of situation occurred here from the acts of the parties, resulting from reliance upon appellant's oral agreement, as creates an equitable estoppel against appellant to now claim that the agreement was within the statute of frauds. See, also, *Browne*, Statute of Frauds (5th ed.), §§ 457a, 458.

The contention that this was an oral contract not to be performed within one year is not available here, by reason of the trust relation resulting from the contract and from part performance. The real question involved is, not the specific performance of the original parol agreement, but, rather, the enforcement of the trust which resulted by operation of law from the original agreement and the acts of the parties. *Rayl v. Rayl*, 58 Kan. 585, 50 Pac. 501; *Fall v. Hazelregg*, 45 Ind. 576, 15 Am. Rep. 278.

We think, therefore, that appellant is estopped to urge the statute of frauds by reason of the oral agreement, and that she occupies the double position of being both trustee of a resulting trust and mortgagee. She is trustee holding the legal title for respondents, and is mortgagee for the amount loaned and the stipulated compensation.

Specific performance may be enforced against her, she may be compelled to convey to respondents, if they shall fully pay the amount and, if not, she may foreclose her mortgage.

The judgment is affirmed.

FULLERTON, C. J., and MOUNT, DUNBAR, and ANDERS, JJ., concur.

[No. 4790. Decided April 14, 1904.]

T. O. ABBOTT, *Appellant*, v. CHESTER THORNE *et al.*,
Respondents.¹

APPEAL—REVIEW—POINT RAISED BY PREVAILING PARTY. Upon an appeal by the plaintiff in a case tried and determined on the merits, the prevailing party may raise the objection that the case cannot be maintained in any event, since it would be idle to order a new trial for error if the action does not lie.

MALICIOUS PROSECUTION—CIVIL ACTION WITHOUT ARREST OR SEIZURE OF PROPERTY. An action for the malicious prosecution of a civil suit without probable cause will not lie when there was no arrest of the person or seizure of property therein, and no special injury sustained which would not necessarily result in all like prosecutions.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered February 11, 1903, upon the verdict of a jury rendered for the defendants by direction of the court after a trial on the merits, dismissing an action for damages for malicious prosecution. Affirmed.

Stiles & Doolittle, for appellant.

Bogle & Richardson, and *Bates & Murray*, for respondents.

¹Reported in 76 Pac. 302.

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Opinion Per DUNBAR, J.

DUNBAR, J.—This is an action by appellant against the respondents for a conspiracy to maliciously prosecute. The action is based upon allegations set forth in the case entitled, "T. B. Deming, plaintiff, v. Pacific Investment Co., J. H. Easterday, T. O. Abbott, L. R. Wheeler, Commercial Investment Co., National Bank of Commerce of Tacoma, and M. J. Adams, defendants." This case came to this court under the title of, "*William H. Opie, as administrator, respondent, v. Pacific Investment Co. et al., appellants,*" reported in 26 Wash. 505, 67 Pac. 231, 56 L. R. A. 778; a judgment of reversal having been obtained in this court by the appellant in the case at bar, and the allegations which the appellant claims were malicious having been found by this court not to be true. The cause proceeded to trial, and upon the conclusion thereof the respondents requested the court for a peremptory instruction to the jury for a verdict in their behalf, which was granted. The ground upon which the motion was granted it is not necessary to discuss, under our view of subsequent questions, which are determinative of the case.

A great many questions are presented by the record and in the briefs of counsel, but preliminary to all others is the question whether or not this case can be maintained. It is insisted by the appellant that this question cannot be raised by the respondents, inasmuch as they prevailed in the court below; but it is too evident for discussion that it would be a foolish proceeding, on the part of this court, to reverse a case and send it back for a new trial, when it would finally have to be determined that the action would not lie; and the view we take of this question renders a discussion of the other proceedings involved unnecessary. On the main question, whether

an action for malicious prosecution will lie where there is no arrest of the person or attachment of the property, there is some conflict of authority, and it has been held by Judge Hanford, in *Wade v. National Bank of Commerce*, 114 Fed. 377, that such an action would lie. Also, in *McCormick Harvester Mach. Co. v. Willan*, 88 N. W. 497, 56 L. R. A. 338, a Nebraska case [63 Neb. 391], the contrary rule announced in *Rice v. Day*, 34 Neb. 100, 51 N. W. 464, was practically overruled.

The leading case sustaining this doctrine is *Kolka v. Jones*, 6 N. D. 461, 71 N. W. 558, 66 Am. St. Rep. 615, where the doctrine was announced that, for the malicious prosecution of a civil action without probable cause, plaintiff was answerable to the defendant, though the latter was not arrested nor his rights interfered with in any manner. This is a North Dakota case, and presents that view of the law very forcibly and clearly, and the conflicting cases are discussed with great precision and power. But, notwithstanding the able opinion in this case, we are forced to the conclusion, from an investigation of authorities and a consideration of the principles involved, that the contrary doctrine is well established, and that an action will not lie for the prosecution of a civil action with malice and without probable cause, when there has been no arrest of the person or attachment of the property of the defendant, and no special injury sustained, or injury which is not the necessary result in such suits. And this doctrine we think is sustained, not only by the overwhelming weight of numerical authority, but by the overwhelming weight of reason.

The right of free allegations in a pleading has always been considered privileged. Courts are instituted to grant relief to litigants, and are open to all who seek remedies

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for injuries sustained; and unnecessary restraint, and fear of disastrous results in some succeeding litigation, ought not to hamper the litigant or intimidate him from fully and fearlessly presenting his case. If the charges prove to be unfounded, costs have been prescribed by the legislature as the measure of damages. Prior to the time when costs were allowed to the prevailing party, there was more reason for sustaining actions on the case; and, as a rule, the costs and expenses incident to an unsuccessful law suit will be sufficient to restrain actions which are founded purely on malice. While it is no doubt true that, in some instances, the peril of costs is not a sufficient restraint, and the recovery of costs is not an adequate compensation for the expenses and annoyances incident to the defense of a suit, yet all who indulge in litigation are necessarily subject to burdens the exact weight of which cannot be calculated in advance, and a rule must be established which, as a whole, is the most wholesome in its effects, and accords in the greatest degree with public policy. If the rule were established that an action could be maintained simply upon the failure of a plaintiff to substantiate the allegations of his complaint in the original action, litigation would become interminable, and the failure of one suit, instead of ending litigation, which is the policy of the law, would be a precursor of another; and, if that suit perchance should fail, it would establish the basis for still another. For the failure to establish the fact alleged that an allegation in the original complaint was malicious, might well warrant the conclusion that the allegation in the second case, charging malice in the allegations of the first action, was malicious, and so on *ad infinitum*.

In *Wetmore v. Mellinger*, 64 Iowa 741, 18 N. W. 870,

52 Am. Rep. 465, it was held that no action would lie for the recovery of the damages sustained by the institution and prosecution of a civil action of malice, and without probable cause, when there had been no arrest of the person nor seizure of the property of the defendant, and no special injury sustained which would not necessarily result in all prosecutions for like causes of action. In that case, in the argument, it was said:

"If an action may be maintained against a plaintiff for the malicious prosecution of a suit without probable cause, why should not a right of action accrue against a defendant who defends without probable cause and with malice? The doctrine surely tends to discourage vexatious litigation, rather than to promote it."

It seems to us that there is much common sense in this observation, for the affirmative allegations of an answer are as liable to contain malicious statements as the affirmative allegations of a complaint; and the result would be, if the doctrine contended for were upheld to its logical conclusion, that the plaintiff in an action would be entitled to damages for the unsupported allegations of an answer; for there is as much publicity given to an answer in an action as there is to a complaint, and damages in one case would be just as liable to be incurred as in the other. The same rule is announced in *Smith v. Hintz*, 67 Ia. 109, 24 N. W. 744, and in *McNamee v. Minke*, 49 Md. 122, where the court, in summing up an argument which holds that the action will not lie, says:

"Otherwise, parties would be constantly involved in litigation, trying over cases that may have failed, upon the mere allegation of false and malicious prosecution."

In *Mayer v. Walter*, 64 Pa. St. 283, it is said:

"But for this rule, the termination of one suit would be, in a multitude of instances, the signal for the insti-

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tution of another, in which the parties would be reversed; and the process might be renewed indefinitely, in contravention of the maxim *interest reipublicae ut sit finis litium*."

It was decided in *Bitz v. Meyer*, 40 N. J. L. 252, 29 Am. Rep. 233, that a civil action, in all its parts, is a claim of right, and is pursued only at the peril of costs, if not sustained, subject to the qualifications that the defendant has been arrested without cause and deprived of his liberty, or made to suffer other special grievances. The same doctrine is specifically announced in: *Supreme Lodge etc. v. Unverzagt*, 76 Md. 104, 24 Atl. 323; *Potts v. Imlay*, 4 N. J. L. 330, 7 Am. Dec. 603; *Terry v. Davis*, 114 N. C. 27, 18 S. E. 943; *Mitchell v. Southwestern Railroad*, 75 Ga. 398; *Gorton v. Brown*, 27 Ill. 489, 81 Am. Dec. 245; *Smith v. Michigan Buggy Co.*, 175 Ill. 619, 51 N. E. 569, 67 Am. St. 242; *Cincinnati Daily Tribune Co. v. Bruck*, 61 Ohio St. 489, 56 N. E. 198, 76 Am. St. 433; *Ely v. Davis*, 111 N. C. 24, 15 S. E. 878; *Luby v. Bennett*, 111 Wis. 613, 87 N. W. 804, 56 L. R. A. 261; 87 Am. St. 897; *Tunstall v. Clifton* (Tex. Civ. App.), 49 S. W. 244; *McCord-Collins Co. v. Levi*, 21 Tex. Civ. App. 109, 50 S. W. 606; and many other cases, a tabulated statement of which would not be of assistance.

But, in addition to outside authority, this court has spoken with no uncertain sound on this subject, and in a case brought by the parties to this action in *Abbott v. National Bank of Commerce*, 20 Wash. 552, 56 Pac. 376, it was held that allegations contained in pleadings filed in a court of competent jurisdiction are absolutely privileged, where they are relevant and pertinent to the cause, regardless of their falsity or maliciousness. In the dis-

cussion of this case it was said by the writer of the opinion, Judge Gordon:

"We think it requires no argument to demonstrate that the words complained of were pertinent and material to the cause, and the question to be determined is, were they absolutely privileged, regardless of whether they were true or false, used maliciously or in good faith? The doctrine of privileged communications rests upon public policy, 'which looks to the free and unfettered administration of justice, though, as an incidental result, it may, in some instances, afford an immunity to the evil-disposed and malignant slanderer;' [citing *Bartlett v. Christulf*, 69 Md. 219, 14 Atl. 518.] It cannot be doubted that it is a privilege liable to be abused, and its abuse may lead to great hardships; but to give legal sanction to such suits as the present would, we think, give rise to far greater hardships."

It is true that this was an action for libel, but the principle involved is exactly the same as is involved in this case, although the form of the action was slightly different. Also, in *Seattle Crockery Co. v. Haley*, 6 Wash. 302, 33 Pac. 650, 36 Am. St. 156, it was said by Judge Stiles, who wrote the opinion:

"While the issuance of an attachment may do injury to this mercantile character and credit of a debtor, it is, in that respect, not different from other judicial proceedings. If the allegations of the affidavit are in one case libelous, and tend to break down the confidence theretofore reposed in the defendant, they are no more so than would be a complaint in a suit for money obtained by alleged false pretenses. And so this kind of injury may be brought about as effectually where no property at all has been taken under the writ. The commencement of an ordinary suit upon a promissory note has fully as great a tendency to impair credit as any other proceeding, for the presumption is that a business man will take care of his notes at least, if he has any regard for his standing in the commercial world; and, if he cannot take care of

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them so that he has to be sued, the inference most naturally is that he is weak in resources, and, therefore, not a safe person to credit. But the note may be forged, or not due, or paid, or there may be counterclaims or good defenses so that the suit is totally unjustifiable. But does any one sue for damages to credit growing out of such proceedings? Not at all, because they are privileged, being proceedings in courts of justice. And so we think this attachment proceeding, and all allegations of fraud made herein, although they may injure the character, reputation or credit of the defendant, are in the same way privileged, and not to be recovered for."

It is said by the appellant that this case is not in point because it was simply decisive of a measure of damages. But the decision on the measure of damages was based upon the theory that the allegations in the complaint were privileged, and that no action would lie for that reason; and it would certainly be inconsistent for this court to hold that damages to reputation and character could be recovered in an action where no attachment had issued, and that they could not be recovered where the defendant's property had been attached, as in the case of *Seattle Crockery Co. v. Haley*, just discussed.

We think the principles announced by this court in the cases just cited would preclude a recovery in this cause, and we are not disposed to retreat from the positions there taken. In this litigious age, when speculative law suits are rapidly multiplying, we think that considerations of sound public policy will not justify courts in announcing a doctrine which tends to encourage this character of litigation.

The judgment is affirmed.

FULLERTON, C. J., and HADLEY, MOUNT, and ANDERS, JJ., concur.

[No. 4951. Decided March 25, 1904.]

GEORGE TAYLOR, JR., *Respondent*, v. CHANDLER HUNTINGTON *et al.*,
Appellants.¹

Appeal from an order of the superior court for King county,
Tallman, J. Affirmed.

John K. Brown and *J. A. Kellogg*, for appellants.

Reed & Rutherford, for respondent.

PER CURIAM.—For the reasons assigned in *Taylor v. Hunting-*
ton, No. 4950 (*ante*, p. 455, 75 Pac. 704), just decided, the judg-
ment in this case is affirmed.

[No. 4989. Decided January 16, 1904.]

SARAH BROCKWAY, *Respondent*, v. T. O. ABBOTT *et al.* *Appellants*.²

Appeal from a judgment of the superior court for Pierce county,
Snell, J., entered August 15, 1903. Dismissed.

Stiles & Doolittle and *Jesse Thomas*, for appellants.

John H. McDaniels, for respondent.

PER CURIAM.—Respondent moves to dismiss the appeal in this
cause for the reason that no notice of appeal has been served upon
the sureties who executed the bond for security for costs, de-
manded of, and furnished and filed by, the plaintiff in the court
below. This case can not be distinguished from *Pierce v. Com-*
mmercial Investment Co., 30 Wash. 272, 72 Pac. 473, where it was
held that the appeal would be dismissed where the sureties on the
cost bond had not received notice of the appeal.

The motion will therefore be sustained, and the appeal dis-
missed.³

¹Reported in 75 Pac. 1135.

²Reported in 74 Pac. 1068.

³NOTE. This case is overruled in *O'Connor v. Lighthizer*, *ante*,
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1. ADVERSE POSSESSION—TIDE LANDS—APPLICATION TO PURCHASE FROM STATE—CLAIM NOT ADVERSE. Adverse possession of a public street across tide lands for ten years is not shown where during the period the claimants were contesting with the officers of the city a claim of a preference right to purchase the lands from the state, since such act is inconsistent with the claim of adverse right. *Port Townsend v. Lewis*..... 413
2. SAME—SEVEN-YEAR STATUTE INAPPLICABLE WITHOUT COLOR OF TITLE, OR IN CASE OF PUBLIC USE. A claim to adverse possession of lands can not be made under Bal. Code, § 5503, where the claimant does not hold under color of title, nor where the lands were held for a public purpose, viz., a public street. *Id.*..... 413

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— For bids on contract. See **SCHOOLS**, 1-4.

AFFIDAVITS:

— How brought up. See **APPEAL AND ERROR**, 23-24.

AGENCY:

See **PRINCIPAL AND AGENT**.

ALIMONY:

— Application of money tendered. See **COMPROMISE**, 6.

AMENDMENT:

See **PLEADINGS**, 7-10.

ANSWER:

See **PLEADINGS**.

APPEAL AND ERROR:

I. NATURE AND JURISDICTION.

II. DECISIONS REVIEWABLE.

- Appointment of guardian. See **CERTIORARI**, 1.
- Order on sufficiency of information. See **HABEAS CORPUS**, 1.
- Temporary appointment of receiver. See **APPEAL AND ERROR**, 22.
- Vacation of default. See **CERTIORARI**, 2.
- Void judgments as to sureties. See **APPEAL AND ERROR**, 10, 12.

1. **APPEAL—DISMISSAL—APPEALABLE ORDER—DIVORCE—JUDGMENT—VACATION OF DECREE ON GROUND OF FRAUD WHEN APPEALABLE.** An appeal from a judgment refusing to vacate a default judgment of divorce will not be dismissed on the ground that decrees of divorce are expressly excepted by statute from the provisions relating to the vacation of judgments, where it appears that the vacation of such decree is sought on the ground that it was procured by fraud. *McDonald v. McDonald*..... 293
2. **APPEAL—FINAL ORDER—JUDGMENT—VACATION BECAUSE NOT AUTHORIZED BY COMPLAINT—ORDER AFTER MORTGAGE FORECLOSURE SALE—APPEALABLE AS AFFECTING SUBSTANTIAL RIGHT.** Where, upon a mortgage foreclosure, there is a sale of the property and a deficiency judgment entered, an order setting aside the deficiency judgment on the ground that it was not authorized by

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the prayer of the complaint would be a final disposition of that part of the case, and appealable as affecting a substantial right, under Bal. Code, § 6500, subd. 1. *State ex rel. Twigg v. Superior Court* 643

3. APPEAL—DISMISSAL—ADMISSION OF APPELLANT—NO CONTROVERSY EXISTING. In an action to enjoin a former trustee and stockholder of a corporation from exercising control over the affairs of the corporation, in which a temporary injunction is granted, an appeal by defendant claiming to be a trustee, will be dismissed on motion on the ground that no controversy exists, where the answer admits that said trustee had sold all of his stock in the corporation, and it is not denied that he had shortly before testified that he was no longer a stockholder and had severed his connection with the corporation. *Oudin & Bergman Fire Clay etc. Co. v. Conlan* 216
4. APPEAL—DISMISSAL—CESSATION OF CONTROVERSY—EXPIRATION OF LIQUOR LICENSE PRIOR TO HEARING. An appeal from an order dismissing a writ of certiorari to review the action of a city council in revoking a liquor license will be dismissed where, prior to the hearing, the license has expired by lapse of time, since there is no longer any controversy. *Holppa v. City Council of Aberdeen* 554

III. PRESERVATION OF GROUNDS.

- Findings, printing. See APPEAL AND ERROR, 34.
 - Findings. See also APPEAL AND ERROR, 39-41.
 - Statement of facts. See APPEAL AND ERROR, 23-31.
 - Waiver by pleading over. See PLEADINGS, 2.
5. APPEAL—REVIEW—EXCEPTION TO INSTRUCTIONS—SUFFICIENCY. A general exception to an entire instruction, "and to each and every part thereof" is insufficient if the charge contains several distinct propositions, any one of which is correctly stated. *Gallamore v. Olympia* 379
 6. TRIAL—OBJECTIONS TO EVIDENCE—REVIEW ON APPEAL. An objection to evidence that is not relevant and material is insufficient to raise the point that it varies the terms of a written contract, and the supreme court will not consider objections to the evidence unless the precise point is raised below. *Anderson v. New York Life Ins. Co.* 616
 7. APPEAL—DISMISSAL—MOTION FOR NEW TRIAL. An appeal will not be dismissed for want of a motion for a new trial, where a paper filed and served was considered as such a motion without objection. *Crooker v. Pacific Lounge & Mattress Co.* 191

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8. SAME—NECESSITY OF. A motion for a new trial is not necessary to secure a review of errors involved in the disposition of the case and fully presented below. *Id.*..... 191

IV. PARTIES.

9. APPEAL—DISMISSAL—PARTIES—SURETIES ON COST BOND WHEN NOT NECESSARY PARTIES—JUDGMENTS AGAINST. Without express statutory authority, a judgment cannot be entered against sureties on cost bonds in the same action in which the bond is filed, but the sureties are entitled to their day in court, and are not parties appearing in the action upon whom notice of appeal need be served, in the absence of any judgment against them (*Brockway v. Abbott*, 700, 74 Pac. 1069, overruled). *O'Connor v. Lighthizer* 152
10. SAME—VOID JUDGMENT—APPEALABLE. Where the court had entered a void judgment against sureties on a cost bond, they may appeal, and they are accordingly necessary parties upon whom notice of appeal must be served. *Id.*..... 152
11. APPEAL—PARTIES—SURETIES ON BOND OF DISTRIBUTEES OF ESTATE—NO JUDGMENT AGAINST. Upon an appeal from an order of distribution of an estate in which the distributees were required to give bonds, the sureties on the bonds are not parties to the judgment upon whom notice of appeal must be served, since under the statute, Pierce's Code, § 2678, no judgment can be taken against them, and they are entitled to their day in court. *Noble v. Whitten*..... 507
12. APPEAL—PARTIES—SURETIES ON COST BOND—ENTRY OF JUDGMENT AGAINST SURETIES. Where upon a dismissal of an action judgment is rendered against the plaintiff and his sureties upon the cost bond, and plaintiff appeals, the sureties are necessary parties to the appeal, upon whom notice of appeal must be served where they do not join as appellants, although the judgment against the sureties was void for want of jurisdiction, and the lower court attempted to vacate it after the appeal was perfected. *Aetna Insurance Co. v. Thompson*..... 610
13. APPEAL—PARTIES—FAILING TO OBJECT TO ACCOUNT—NOTICE—NAMING UNNECESSARY PARTY—FAILURE OF SUCH PARTY TO JOIN IN BOND. An appeal from an order of final distribution of an estate should not be dismissed because one of the persons named in the notice of appeal did not join in the execution of the appeal bond, when it appears that such person did not file any objections to the account and his successors in interest filed objections and

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duly joined in the appeal; since he was therefore not a necessary party to the appeal. *Noble v. Whitten*..... 507

14. **APPEAL—PARTIES—ASSIGNEE OF JUDGMENT—SERVICE OF NOTICE UPON, NOT NECESSARY.** The assignee of a judgment is not a party in interest, upon whom notice of appeal must be served, and an appeal will not be dismissed for failure to make such service, but upon request the assignee will be substituted as party respondent. *Currans v. Seattle & San F. R. & Nav. Co.*..... 512

V. REQUISITES.

15. **APPEAL—NOTICE—SUFFICIENCY—DISMISSAL.** A notice of appeal reciting that appellants hereby give notice of their application to appeal to the supreme court, is not so defective as to warrant a dismissal in view of Laws 1899, p. 79, § 1, providing that no appeal shall be dismissed for any informality or defect in the notice if the appellant shall, upon order, perfect the appeal. *Brown v. Calloway*..... 175
16. **APPEAL—NOTICE—PARTIES NAMED IN BODY OF NOTICE—GUARDIAN AD LITEM SIGNING NOTICE AS ATTORNEY—SUFFICIENCY.** An appeal should not be dismissed because not joined in by certain interested minors, where the body of the notice includes their names as appealing by their guardian *ad litem*, P., although it is signed by P. on behalf of all the parties as "their attorney" only, since he thereby purports to represent all the parties as attorney and it was not essential that he also sign as guardian *ad litem* for part of them. *Noble v. Whitten*..... 507
17. **APPEAL—BONDS—OBJECTION TO SURETY.** An objection to an appeal bond that the surety was not qualified must be first raised in the court below. *Id.*..... 507
18. **APPEAL—BOND—JUSTIFICATION OF SURETIES.** An appeal will not be dismissed because of defects in the form of the justification of the sureties on the appeal bond where no objection was made in the court below, as the objection is one going to the sufficiency of the sureties. *Frew v. Clark*..... 561
19. **APPEAL—BONDS—EXEMPTION OF COUNTY WHEN NOT AVAILABLE TO COUNTY OFFICER—JUDGMENT AGAINST COUNTY—DUTY OF COUNTY AUDITOR TO ISSUE WARRANT.** Where a county auditor appeals from a judgment of mandamus against him, compelling him to issue a warrant on account of a judgment regular on its face, recovered against the county, and which judgment is not appealed from or contested by the county, and no question is raised as to the fund from which it is to be paid, the appeal is not an appeal in the interest of the county, dispensing with the necessity of an

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appeal bond, since the auditor's duty is plain and the appeal one in his own interest in which he has become involved by his own course; and the appeal should be dismissed where no appeal bond is given. *State ex rel. Smith v. Blumberg*..... 640

VI. EFFECT AND STAY.

20. APPEAL—EFFECT OF, ON JURISDICTION OF LOWER COURT—JUDGMENTS—VACATION AFTER APPEAL PERFECTED. After an appeal is perfected, the jurisdiction of the lower court is at an end, and it has no power to vacate the judgment as to appellant's sureties on the cost bond, inadvertently entered against the sureties without notice, although the judgment was void for want of jurisdiction, since the supreme court has exclusive jurisdiction of the case. *Aetna Insurance Co. v. Thompson*..... 610
21. APPEAL—BOND—APPLICATION TO FIX AMOUNT OF SUPERSEDEAS. The fact that an appeal from an order appointing a receiver had not been perfected is not ground for the trial judge to refuse to fix the amount of the supersedeas bond on appeal, when the time for taking an appeal had not yet expired, since Bal. Code, § 6506 contemplates that an appeal may be perfected by the giving of one bond as an appeal and supersedeas bond in the sum fixed by the court. *State ex rel. Wash. Match Co. v. Sup'r Court*..... 123
22. APPEAL AND ERROR — RECEIVERS — APPOINTMENT — STAY OF RECEIVERSHIP UPON APPEAL. Where a temporary receiver is appointed ex parte until a hearing can be had, and continuances are taken, until finally an order is entered in form making the temporary appointment permanent, such order is appealable as a temporary appointment regardless of its form, entitling appellant to give a bond staying the receivership; since the ex parte appointment had no force after the day of hearing, and a continuance or failure to appoint at that time had the effect to discharge the receiver, making the subsequent order a temporary appointment that could be appealed from and stayed. *Id.*..... 123

VII. RECORD.

23. APPEAL AND ERROR—AFFIDAVITS HOW BROUGHT UP. Affidavits used upon a motion to vacate a judgment must be brought up by a statement of facts or they cannot be considered on appeal. *Sellers v. Pacific Wrecking etc. Co.*..... 111
24. APPEAL—RECORD—AFFIDAVITS HOW BROUGHT UP. Affidavits in support of a motion for a new trial will not be considered on appeal unless embodied in a bill of exceptions or statement of facts. *State v. Yandell*..... 409

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25. **SAME—STATEMENT OF FACTS—SERVICE BEFORE FILING.** A statement of facts served before it is filed is not a compliance with the law and can not be considered. *Id.*..... 409
26. **SAME—TIME OF FILING.** A statement of facts must be filed within thirty days from the date of the judgment, where no extension of time is given, or it can not be considered. *Id.*..... 409
27. **APPEAL—STATEMENT OF FACTS—PROOF OF FILING.** Where the statement of facts is bound separately from the transcript, the endorsement on the former of the date of filing over the signature of the clerk of the lower court ought to be sufficient proof that it was so filed, since by Laws 1901, p. 28, § 2, the statement is a part of the record. *Johnston v. Gerry.*..... 524
28. **SAME—SUPPLEMENTAL RECORD TO SHOW FILING AND NOTICE OF SETTLEMENT.** A motion, made in the brief before the transcript is filed, to strike the statement of facts for failure to duly show that it was filed in time or that notice of settlement was served, should be denied where the next day a supplemental transcript is prepared and sent up showing due filing, notice and proof of due service; and such motion does not preclude additions to the record since there was at the time nothing in the appellate court upon which it could operate, and Laws 1901, p. 28, authorizes such additions. *Id.*..... 524
29. **SAME—SERVICE OF NOTICE OF SETTLEMENT—PROOF BY THE CERTIFICATE.** A recitation in the trial judge's certificate of an appearance and consent at the time of certifying a statement of facts is persuasive argument against granting a motion to strike the statement for failure of the record to show notice of settlement and proof of service. *Id.*..... 524
30. **APPEAL—RECORD—COSTS—SHOWING ON MOTION TO RETAX.** A motion to retax the costs allowed below will not be considered on appeal where the record does not disclose the showing that was made below, and all the costs might be taxed under certain circumstances. *Port Townsend v. Lewis.*..... 413
31. **CRIMINAL LAW—EXCESSIVE SENTENCE—NOT REVIEWED IN ABSENCE OF EVIDENCE.** Where the evidence is not brought up, the court will not consider an objection that the sentence is excessive, although it appears that the jury recommended the defendant to the mercy of the court. *State v. Ryan.*..... 597

VIII. BRIEFS.

32. **APPEAL—BRIEFS—ASSIGNMENT OF ERRORS—SUFFICIENCY.** Briefs will not be struck out and the case affirmed for failure to clearly point out each error, where but one error is relied on, and that

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is stated clearly at the close of the statement of facts. *Brown v. Calloway* 175

33. APPEAL—BRIEFS—ASSIGNMENT OF ERRORS. While errors not pointed out with reasonable clearness will not be considered, a brief will not be struck out for failure to assign the errors where alleged errors are set forth with the pages of the record showing the various rulings, and rule eight is substantially complied with. *Johnston v. Gerry*..... 524
34. APPEAL—BRIEFS—PRINTING FINDINGS—DISMISSAL. An appeal will not be dismissed because of the failure of the appellant to print the findings of fact in the opening brief where, after the motion, the findings are printed in appellant's reply brief (*Young v. Borzone*, 26 Wash. 4, followed). *Timm v. Timm*..... 228

IX. MOTIONS AND DISMISSAL.

— Dismissal. See, also, APPEAL AND ERROR, 1, 3, 7, 9, 13-19.

35. APPEAL—DISMISSAL—PENDENCY OF PRIOR APPEAL—ABANDONMENT. Where two appeals are taken and a motion is made to dismiss the second appeal because of the pendency of the first, and on the oral argument counsel state that they have abandoned the first appeal and rely only on the second, the motion will be denied. *Noble v. Whitten*..... 507

X. REVIEW.

- Bill of review. See COURTS, 2.
- Discretion. See DIVORCE, 2; NEW TRIAL, 2; TRIAL, 1.
- Findings or verdict on conflicting evidence. See CRIMINAL LAW, 13; MECHANICS' LIENS, 2; SPECIFIC PERFORMANCE, 3; TRIAL, 4, 7; VENDOR AND PURCHASER, 5.
- New trial on question of law. See NEW TRIAL, 1.
- Submission of special verdict. See TRIAL, 5.
- Harmless error, in admission of evidence. See CRIMINAL LAW, 10; EVIDENCE, 2; PLEADINGS, 3.
- Harmless error, order of proof. See TRIAL, 2.
- Harmless error, in conduct of jurors. See NEW TRIAL, 3.
- Harmless error, in instructions. See TRIAL, 11.

36. VERDICT—AMOUNT OF ASSESSMENT FAVORABLE TO APPELLANT—RIGHT TO ALLEGE ERROR. Where a verdict for the plaintiff is less than the amount conceded to be due, if anything at all is due, the error is not prejudicial to the defendant, and he can not complain that it does not conform to the evidence. *Seattle Brewing etc. Co. v. Donofrio*..... 18

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37. TRIAL — CROSS-EXAMINATION RESPECTING AFFIRMATIVE DEFENSE—HARMLESS ERROR. Error can not be predicated upon the exclusion of cross-examination of plaintiff's witnesses respecting defendant's affirmative defense, especially when the matter was subsequently established without contradiction. *Port Townsend v. Lewis*..... 413
38. APPEAL—REVIEW—POINT RAISED BY PREVAILING PARTY. Upon an appeal by the plaintiff in a case tried and determined on the merits, the prevailing party may raise the objection that the case cannot be maintained in any event, since it would be idle to order a new trial for error if the action does not lie. *Abbott v. Thorne* 692
39. APPEAL—FINDINGS ON CONFLICTING EVIDENCE—REVIEW. Findings in an equity case should not be disturbed where but two witnesses testify and their evidence is conflicting and the lower court had an opportunity to observe their appearance and conduct on the witness stand. *Chantler v. Hubbell*..... 211
40. APPEAL—REVIEW—FINDINGS ON CONFLICTING EVIDENCE. Findings as to the reasonable value of a school building will not be disturbed on conflicting evidence. *Criswell v. Directors School Dist. No. 24*..... 429
41. APPEAL—REVIEW—FINDINGS ON CONFLICTING EVIDENCE. Where there is decided conflict on material points, the trial court's decision as to the weight of the evidence should not be disturbed, where the trial court saw and heard the witnesses. *Borrow v. Borrow* 624
42. EVIDENCE—HEARSAY—ERROR CURED BY DIRECT TESTIMONY OF THE STATEMENT. It is harmless error to receive hearsay testimony of the statement of a party where such party afterwards confirmed the same by his own testimony. *Hankel v. Denison*... 51
43. EVIDENCE—HARMLESS ON TRIAL *de novo*. The erroneous admission of evidence is harmless where there is a trial *de novo* on appeal. *Id.*..... 51
44. APPEAL—REVIEW—HARMLESS ERROR ON ADMISSION OF EVIDENCE. In an action triable *de novo* on appeal, error can not be predicated on the admission of incompetent evidence. *Jefferson County v. Trumbull*..... 276
Hunt v. Phillips 262
Muir v. Westcott 453
46. APPEAL—REVIEW—HARMLESS ERROR. Error in the admission of evidence in an action to recover possession of real estate tried

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before the court upon waiving a jury, is harmless since the supreme court tries the case *de novo* on appeal. *Port Townsend v. Lewis* 413

47. APPEAL AND ERROR—TRIAL—EVIDENCE—HARMLESS ERROR ON TRIAL *de novo*. It is not error for the trial court where a jury is waived, to receive evidence subject to objection, and make up findings without announcing any ruling thereon, since the cause is tried *de novo* on appeal and reversed only for the rejection of proper testimony, improper testimony being disregarded. *Tilden v. Gordon & Co.*..... 92

48. EVIDENCE—HARMLESS ERROR—RULE OF RAILROAD COMPANY—FACT OTHERWISE ESTABLISHED. The erroneous admission in evidence of a rule of a railroad company from which the jury would be led to believe that a conductor had the right to direct the movement of trains in passing, as senior conductor, is harmless where the conductor testifies on behalf of the party objecting that he had such a right in any event from the position of the trains in question. *Morrison v. Northern Pac. R. Co.*..... 70

49. APPEAL—REVIEW—HARMLESS ERROR—WAIVER OF NONSUIT BY GOING TO TRIAL. In an action tried before the court without a jury, a motion for a nonsuit is waived by going on with the trial. *Port Townsend v. Lewis*..... 413

XI. DECISION.

- Law of the case. See PLEADINGS, 7; SEAMEN, 1.
- Costs for transcript. See COSTS, 4, 5.

50. APPEAL—COSTS. Held not inequitable, under the circumstances of the case, to allow no costs on appeal to either party. *Johnston v. Gerry* 524

51. APPEAL—DECISION—IMPORTANCE OF CASE. The fact of the great importance of the case by reason of the large amount involved in similar pending cases does not justify departure from established principles. *Gove v. Tacoma*..... 434

52. APPEAL—DECISION—LAW OF CASE—SAME EVIDENCE AS TO CONTRIBUTORY NEGLIGENCE. Upon the second appeal of a case, after substantially the same evidence, the decision on the first appeal that plaintiff was not guilty of contributory negligence becomes the law of the case, and is conclusive. *Crooker v. Pacific Lounge and Mattress Co.* 191

53. APPEAL—DECISION—LAW OF THE CASE—HUSBAND AND WIFE—ACTION ON NOTE MADE IN MONTANA—DEFENSES—FORECLOSURE OF MORTGAGE BEFORE RECOVERY OF NOTE. After the appellate court has held on a former appeal that the plaintiff in an action on a

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promissory note made in Montana need not show that a mortgage securing the same has been foreclosed (the Montana statute providing that there shall be no recovery on the note until after foreclosure), but that such fact and the laws of Montana relating thereto are matters of defense, it becomes the law of the case and it is error to grant a nonsuit for the failure of the plaintiff to prove the foreclosure of the mortgage. *Clark v. Eltinge*..... 323

54. COSTS—INTEREST. Where the appellant is entitled to interest only from the time the amount due is determined, the supreme court upon reversing the lower court and determining the amount due, should allow interest thereon only from the date of the final judgment in the supreme court, and not from the date of the judgment appealed from. *Johnston v. Gerry*..... 524

APPEARANCE:

— On release of execution. See EXEMPTIONS, 2.

APPROPRIATION:

— Of waters. See IRRIGATION, 1-4.

ARBITRATION AND AWARD:

1. ARBITRATION—TIME FOR AWARD LIMITED. Where an agreement for an arbitration expressly limits the time within which the award is to be made, the power of the arbitrators expires at the end of the time limited unless the same is extended or waived. *Jordan v. Lobe*..... 42
2. SAME—WAIVER OR EXTENSION OF TIME LIMITED. Where, after the hearing on an arbitration in which the time for making an award was limited to twenty days, it was agreed that the award need not be considered until one of the arbitrators could go to Alaska and return, without anything being said about how long the trip would take, and he returned two days before the time expired, but nothing was done to make the award until more than twenty days after such return, whereupon one of the parties served notice of a revocation of the arbitration, an award made thereafter is void and the court is without jurisdiction to affirm it. *Id.*..... 42
3. SAME—REVOCATION—NOTICE OF DECISION—EVIDENCE. If such notice of revocation was necessary prior to knowledge of the determination in order to avoid a waiver of the time limit by silence, such waiver will not be found unless established by a preponderance of the evidence when notice of revocation was given before the award was filed or definitely settled upon. *Id.* 42

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- Authority to change contract. See INDEMNITY, 1, 2; PRINCIPAL AND AGENT, 3.

ARREST:

- Of persons. See MALICIOUS PROSECUTION, 1.

ASSESSMENT:

- See TAXATION.
- For local improvements. See MUNICIPAL CORPORATIONS, 8, 9.

ASSIGNMENT:

- Of Contract, essential. See PLEADINGS, 8.
 - Of Errors. See APPEAL AND ERROR, 32, 33.
 - Of policy, equitable. See INSURANCE, 5.
 - Of stock as collateral. See PLEDGE, 1.
1. ASSIGNMENT—DELIVERY—EVIDENCE—SUFFICIENCY—TITLE OF PLAINTIFF—FAILURE OF PROOF AS TO DELIVERY OF PAPERS—NON-SUIT. In an action for the recovery of possession of premises in which the plaintiff claimed through a written assignment of a lease from B, there is a total failure of proof as to plaintiff's title and a nonsuit should be granted, where it appears that the assignment was made in consideration of \$350, that only \$50 was paid to one S, an attorney acting as agent between the parties, that the balance was to be paid upon the plaintiff's obtaining possession, and that the lease and assignment were not delivered to the plaintiff, but were held by S until the balance of the purchase price was paid, since there is a complete failure of proof as to the delivery of the papers constituting plaintiff's title. *Malloy v. Benway* 315

ASSOCIATIONS:

- See BENEFICIAL ASSOCIATIONS.

ATTEMPTS:

- Information for. See CRIMINAL LAW, 1.

ATTORNEY AND CLIENT:

- Authority, ratification. See COMPROMISE, 6.
- Contract of employment, trust. See PRINCIPAL AND AGENT, 7-9.
- Fees, chattel mortgage foreclosure. See COMPROMISE, 5.
- Fees, taxable. See COSTS, 1, 2.

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1. ATTORNEY AND CLIENT—AUTHORITY TO COMPROMISE SUIT—COMPROMISE OF PROPERTY RIGHTS IN ACTION FOR DIVORCE. An attorney is not authorized to settle the property rights of his client in a divorce case without express authority, and none appears where the attorney testified that his client had given him to understand that she ought to have one-half of the property, and later wrote him urging him to get the matter fixed up, whereupon he settled property rights valued at \$3,000 by the receipt of notes for \$250, and after being notified of the settlement, the client was dissatisfied therewith and refused to accept the money, and testified that she had never authorized a settlement for less than one-half the property. *Timm v. Timm*..... 228
2. ATTORNEY AND CLIENT—ATTORNEY'S PURCHASE OF ADVERSE TITLE—TERMINATION OF EMPLOYMENT—USING INFORMATION AGAINST CLIENT—TRUSTS. Where an attorney buys in an outstanding title adverse to the title of his client, concerning which he was employed, he holds it in trust for his client, even if the employment was terminated, for the reason that he cannot use his information against his client. *Carson v. Fogg* 448
3. SAME. This rule is especially applicable where the attorney was to be paid a certain part of "whatever may be saved, had, received or recovered," since the employment was thereby extended beyond the time of actual litigation, and contemplated a fiduciary relation. *Id.*..... 448
4. SERVICES—CONTRACT FOR ONE-HALF OF AMOUNT SAVED—ACCOUNTING. Where an attorney defends a foreclosure suit for one-half of whatever may be saved or recovered, and after judgment of foreclosure and sale, undertakes to negotiate a sale to a third person of three of the five lots for a sum sufficient to buy up the certificate of sale, pay all expenses, and \$500 additional, which was paid to the clients for a quitclaim of the three lots, the attorney cannot purchase for his own use the certificate of sale and hold the same for redemption against the remaining two lots, on the theory that his employment had ceased; but, on such purchase, he holds the certificate in trust for the clients; and upon an accounting he is entitled, under the terms of his contract of employment, to one-half of the two lots redeemed by the sale, and one-half of the \$500 paid to the clients. *Id.* 448

AWARD:

See ARBITRATION AND AWARD.

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1. **INSURANCE—BENEFICIAL ASSOCIATIONS—PAYMENT OF DUES—DATE OF ISSUANCE OF CERTIFICATE—CONSTRUCTION OF CLAUSE IN CONSTITUTION.** Where a clause in the constitution of a beneficial society provides that a member shall be liable for the month in which his certificate is "issued or dated," but another clause provides that there shall be no liability on the part of the society until the Degree of Fraternity is conferred, one assessment paid, and the certificate is delivered and "accepted in writing," a certificate is not "issued" when signed and dated, nor until it is delivered, since the relations between the member and the association are contractual and the obligations must be mutual; hence under a certificate dated and signed August 12, but not delivered until September 2, at which time the first assessment was paid, and the degree conferred, there is no liability for dues for the month of August. *Logsdon v. Supreme Lodge of Fraternal Union of America* 666
2. **SAME—APPLICATION OF DUES.** In such a case, it would be immaterial that the payment had been applied by the association to dues for the month of August, and that another payment had been made in September in advance, since the defense of forfeiture is not available as long as sufficient funds of the member were timely received to meet his assessments. *Id.* 666
3. **SAME—CONSTRUCTION—FORFEITURES NOT FAVORED.** All the provisions respecting dues in benevolent associations must be construed together, and, as forfeitures are not favored, doubtful language will be construed in favor of the insured to avoid a forfeiture. *Id.* 666

BICYCLES:

— Path, obstructions. See **HIGHWAYS**, 1.

BILL OF EXCEPTIONS:

See **APPEAL AND ERROR**.

BILL OF REVIEW:

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BILL OF SALE:

— Construction. See **SALES**, 4.

BONA FIDE PURCHASERS:

See **EXECUTORS AND ADMINISTRATORS**, 4.

BONDS:

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- Consideration for. See **INDEMNITY**, 1, 2.
- Judgment against sureties. See **APPEAL AND ERROR**, 9-12, 20.
- On appeal. See **APPEAL AND ERROR**, 17-22.

BROKERS:

- Sales of merchandise through. See **SALES**, 2.

1. **BROKERS—SALES—OPTION—PLEADINGS—SUPPLEMENTAL COMPLAINT INTRODUCING NEW CAUSE OF ACTION.** In an action to recover commissions for effecting a sale, a written contract optional in form, is not evidence of an actual sale, and a supplemental complaint showing a subsequent sale by payment in full under the option introduces a cause of action not existing before, and cannot be sustained on the theory that it merely introduces new facts showing that the parties construed the transaction as an actual sale from the beginning. *Lawrence v. Pederson*..... 1
2. **BROKERS—ACTION FOR COMMISSIONS—OPTION NOT A SALE—PART PAYMENT UNDER AN OPTION.** A broker, whose contract is to effect a sale, is not entitled to commissions where the contract for the sale of mining property for \$56,500 stipulates that the owner agrees to sell upon the payment of specified amounts at certain times, without any agreement on the part of the purchaser to pay the amounts, although \$2,500 is paid for the privilege of the option, and possession is taken and improvements are made, and later \$5,000 more is paid for an extension, the greater part of the price still being unpaid and there being no assurance that it would be paid. *Id.* 1
3. **SAME—CONTRACTS—AMBIGUITY—PAROL EVIDENCE AS TO CONSTRUCTION.** Such a contract is in no sense ambiguous and hence parol testimony as to the construction placed thereon by the parties would be inadmissible, and could not establish the fact that the parties considered it as a sale from the beginning. *Id.*..... 1

BRIEFS:

- See **APPEAL AND ERROR**, 32-34.

BURGLARY:

- Attempt to commit. See **CRIMINAL LAW**, 1.

CARRIERS:

1. **CARRIERS—PASSENGER THROWN FROM STREET CAR—CONTRIBUTORY NEGLIGENCE—INTOXICATION OF PLAINTIFF—INSTRUCTIONS.** In an action by a passenger for personal injuries sustained by being thrown from the running board of a street car, in which there was some evidence to show that the plaintiff was intoxicated at

'CARRIERS—CONTINUED.

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the time, it is not error to instruct that if the plaintiff used that degree of care incumbent upon him under the circumstances, then his intoxication would not prevent his recovery, and that the question was not whether he was intoxicated, but whether he exercised ordinary care, where in connection with all the instructions the effect was not that the jury could not consider intoxication as an element in determining the question of due care, but that the latter question was the real one to be determined and not merely the matter of the intoxication. *Lawson v. Seattle & Renton R. Co.* 500

CERTIORARI:

1. **CERTIORARI—APPOINTMENT OF GUARDIAN—REVIEW—ADEQUATE REMEDY BY APPEAL.** A writ of certiorari will not be granted to review the action of the superior court in appointing a guardian without jurisdiction, since there is an adequate remedy by appeal, and the delays incident to appeals do not affect the adequacy of the remedy. *State ex rel. Young v. Denney*..... 56
2. **CERTIORARI—TO REVIEW ORDER VACATING JUDGMENT—ADEQUATE REMEDY BY APPEAL.** A writ of review will not be granted to review an order vacating a default judgment in a tax lien foreclosure and allowing the defendant to appear and defend where no emergency is shown, since there is an adequate remedy by appeal from the final judgment, and it is against the policy of the law to try cases by piecemeal. *State ex rel. Harris v. Superior Court* 248

CHATTEL MORTGAGES:

— Mistake in payment, allowance of attorney's fee. See COMPROMISE, 5.

CITY AND CITY OFFICERS:

See MUNICIPAL CORPORATIONS.

COLOR OF TITLE:

See ADVERSE POSSESSION, 2.

COMMUNITY PROPERTY:

— Expenditures on personal injury to wife. See PARTIES, 3.

1. **COMMUNITY PROPERTY—STATUTES—TITLE—AGREEMENT TO TAKE EFFECT UPON DEATH.** An act entitled "An act relating to and defining the property rights of husband and wife" is sufficient to support the provisions of § 4492, Bal. Code, authorizing an agree-

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ment between husband and wife passing the title to community realty to the survivor upon the death of either spouse, since it need not be an index of the act, and such provision is germane thereto. *McKnight v. McDonald*..... 98

2. SAME—AGREEMENT TAKING EFFECT UPON DEATH NOT A WILL—GENERAL PROVISIONS YIELD TO SUBSEQUENT SPECIAL ONES. Said act is not open to the objection that it refers to the construction of wills and repeals Bal. Code, § 4601, since such an agreement is not a will and is not governed by the law relating to wills; and if it were, the general provisions would yield to this subsequent special one. *Id.*..... 98

3. COMMUNITY PROPERTY—IMPROVEMENTS ON HUSBAND'S SEPARATE REAL ESTATE—REIMBURSEMENT TO SURVIVING WIFE. Where husband and wife by their joint efforts add \$900 in value to the husband's separate real estate, upon the death of the husband without issue, the wife, as survivor of the community, is entitled to reimbursement from such separate estate, for the said value of the improvements made by the community. *Legg v. Legg*..... 132

4. COMMUNITY PROPERTY—LIABILITY FOR HUSBAND'S DEBT CONTRACTED IN MONTANA—PLEADING WIFE'S EXEMPTION—PRESUMPTIONS. The presumption that a debt contracted by a husband in Montana is a community debt is not overcome by the wife's pleading a Montana statute providing that the wife's separate property is exempt from the husband's debts, under certain conditions, without further setting up the necessary conditions to entitle her to the exemption from the liability. *Clark v. Ellinger*..... 223

5. HUSBAND AND WIFE—SEPARATE PROPERTY OF WIFE—ACQUIRED BY EFFORTS OF WIFE UNDER LAWS OF OREGON. Where a married woman living with her husband near a mining claim in Alaska takes a half interest in a lay thereon, hires a man to perform half the work, who is paid out of her share of the clean-up, and she personally supervises the work, her net proceeds are her separate property under the laws of Oregon so providing as to property acquired by a married woman "by her own labor," although she performed no manual labor thereon, the law meaning, by her own efforts. *Elliott v. Hawley*..... 585

6. SAME—SITUS OF PARTNERSHIP PROPERTY—SEPARATE PROPERTY OF WIFE REMOVED TO THIS STATE—NOT SUBJECT TO HUSBAND'S DEBTS. Where by the laws of Oregon the profits of a mining venture made by a married woman in Alaska became her separate property, and were brought to this state and deposited as the funds of the partnership by which it was acquired, her share remains her separate property, and real estate purchased by her and paid

COMMUNITY PROPERTY—CONTINUED.

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by a check of said partnership in a sum less than the amount due her, is not subject to her husband's separate debt. *Id.*..... 585

7. SAME—RESTRICTIONS AGAINST PARTNERSHIP BETWEEN HUSBAND AND WIFE. The restrictions against a husband and wife's entering into a partnership are only to protect the wife from the husband's debts, and not to deprive her of her property. *Id.*..... 585

8. SAME—COMMINGLING WIFE'S SEPARATE FUNDS WITH HUSBAND'S. Where the amount invested by both husband and wife in a joint venture is definite and it yields a definite increase, there is no such commingling or confusion of the separate interests as to lose their identity. *Id.*..... 585

COMPROMISE:

- Abandonment of. See PRINCIPAL AND AGENT, 2.
- Authority to make. See ATTORNEY AND CLIENT, 1.
- Of void policy, defense against insured. See INSURANCE, 5.

1. COMPROMISE—SALE OF GOODS IN SETTLEMENT OF ACCOUNT—FAILURE TO AGREE—ABANDONMENT AND RETURN OF GOODS. Where, upon the settlement of an account by the purchase of the debtor's property, the balance of the purchase price is agreed upon, and the property is actually transferred, the debtor cannot claim that the testimony conclusively shows a settlement, when it further appears that, upon coming to close the sale, the parties could not agree upon the parties to whom the balance due on the purchase price should be paid, and the creditor thereupon abandoned the settlement and returned the property to the person from whom it was received. *Seattle Brewing & Malting Co. v. Donofrio* 18
2. COMPROMISE—CONSIDERATION—PAYMENT IN CASH OF SUM LESS THAN TOTAL—WHOLE DEBT NOT DUE. There is sufficient consideration for the settlement of notes by a cash payment of a less sum than the total, where part of the debt was not due and the settlement was acted upon. *Russell & Co. v. Stevenson.*..... 166
3. COMPROMISE—MUTUAL MISTAKE—EVIDENCE—SUFFICIENCY. In an action to collect a balance due on notes, in which the defense is a settlement of the account by an agent of the plaintiff, a mutual mistake in the settlement entitling plaintiff to recover the amount of the mistake is shown, where it appears that the agent who was authorized to collect the account had an itemized statement, showing partial payments and credits, among which was a credit on one note of \$285.35 and upon another of \$214.65, being one payment of \$500, and which was not credited on the date of payment, that the defendant claimed a payment of \$500 not shown by the statement, and produced a receipt therefor, and

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that neither of the parties recognized the aforesaid credits as such payment, and the agent allowed the claim for \$500, and settled the balance due, and on discovering the mistake, offered to return the money paid and gave notice that the settlement was rescinded. *Id.* 166

4. SAME—MISTAKE AS TO ONE ITEM—WHEN DOES NOT AVOID SETTLEMENT. In such a case it is error to find that the mistake was due entirely to the negligence of plaintiff's agent, and it appearing that it did not affect the settlement of the other items of the account, the court should have found a mutual mistake that did not avoid the settlement, or entitle the plaintiff to rescind the same. *Id.* 166
5. COMPROMISE—MUTUAL MISTAKE NOT AVOIDING THE SETTLEMENT—ACTION TO FORECLOSE CHATTEL MORTGAGES—JURISDICTION TO GRANT RELIEF FROM MUTUAL MISTAKE. In an action to foreclose chattle mortgages after an attempted rescission of a settlement, in which plaintiff sued for the full amount of the balance, and defendant based his defense upon the settlement in which a mutual mistake in allowing a credit of \$500 was made, the court has jurisdiction to enter judgment as the facts warrant, and where the mistake was not such as to avoid the settlement, should give judgment for \$500, without attorney's fees. *Id.*.... 166
6. COMPROMISE—ATTORNEY'S SETTLEMENT—RATIFICATION—DIVORCE—DIVISION OF PROPERTY PURSUANT TO UNAUTHORIZED SETTLEMENT—NO ESTOPPEL BY PARTIAL APPLICATION OF DEPOSIT IN COURT TO PAYMENT OF SUIT MONEY. Where, pending a divorce, the defendant's attorney makes an unauthorized settlement of the property rights, accepting \$250 in full for the wife's interest in property of the value of \$3,000, which the wife refuses to accept, and deposits the amount paid to her in the registry of the court, and the court applies \$112 thereof for temporary alimony and attorneys' fees, which the plaintiff had been ordered to pay to the defendant, it is error for the trial court in awarding the defendant a divorce on the ground of plaintiff's cruelty, to find that the settlement is conclusive upon the defendant and to order that her share in the community property be limited to the balance of the sum paid on such settlement, and the defendant is not estopped by accepting the part of the proceeds awarded to her as suit money and alimony; especially since such division is inequitable, and contracts for the division of property made out of court in divorce cases should not be enforced unless fairly made and reasonably just. *Timm v. Timm* 228

CONDITION PRECEDENT:

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See **VENDOR AND PURCHASER**, 2.

CONFLICT OF LAWS:

See **COMMUNITY PROPERTY**, 3-6.

CONFUSION OF GOODS:

See **COMMUNITY PROPERTY**, 8.

CONSTITUTIONAL LAW:

— Due process, scienter. See **CRIMINAL LAW**, 6.

— Due process and vested rights. See **LIMITATION OF ACTIONS**, 3.

1. **CONSTITUTIONAL LAW—CLASS LEGISLATION—PROSTITUTION—DISCRIMINATION BETWEEN MALES AND FEMALES—LAWFULNESS OF ACT.** Laws 1903, p. 230, making it unlawful for male persons to live off the earnings of prostitutes, is not in conflict with the fourteenth amendment of the federal constitution because it discriminates between male and female persons, since the privileges and immunities referred to are such only as are lawful, and prostitution may be prohibited or restricted to any class and in any way without infringing constitutional provisions. *State ex rel. Zenner v. Graham* 81

CONTEMPT:

— Threatened punishment. See **PROHIBITION**, 1.

CONTINUANCE:

1. **TRIAL—CONTINUANCE—DISCRETION—INTOXICATION OF WITNESS.** It is not an abuse of discretion to refuse a continuance on the ground of the intoxication of a witness, where other witnesses had testified to the same facts which he was expected to swear to, and the adverse party admitted that he would so testify if sober, and where a continuance of one day had already been taken on that account. *Benson v. Town of Hamilton*..... 201

CONTRACTS:

- Building, unauthorized change. See **PRINCIPAL AND AGENT**, 3.
- Building, performance accepted. See **MECHANICS' LIENS**, 1.
- Building, validity. See **SCHOOLS**, 1-2.
- Consideration for. See **INDEMNITY**, 1, 2.
- Employment, construction of. See **ATTORNEY AND CLIENT**, 3, 4; **PRINCIPAL AND AGENT**, 13.

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- Execution, delivery. See ASSIGNMENTS, 1; BENEFICIAL ASSOCIATIONS, 1.
 - Execution by trustee. See PRINCIPAL AND AGENT, 4, 5.
 - Joinder, with tort. See ACTIONS, 1; MASTER AND SERVANT, 1.
 - Oral evidence as to. See BROKERS, 3; EVIDENCE, 3-7; FRAUDS, STATUTE OF; VENDOR AND PURCHASER, 1, 2.
 - To sell lands. See SPECIFIC PERFORMANCE, 3; VENDOR AND PURCHASER.
1. CONTRACTS—CONSTRUCTION—CONTINGENCY OF ISSUANCE OF PATENT—PLEADING. Where a payment under a contract was to be made when letters patent were granted upon an invention, the complaint sufficiently shows that the contingency has occurred by an allegation that the commissioner of patents made an order allowing the patent and directing that a patent issue on the order of the interested parties therefor. *Landers v. Foster*..... 674

CONTRIBUTORY NEGLIGENCE:

- Of passenger. See CARRIERS, 1.
- Of pedestrian in street. See MUNICIPAL CORPORATIONS, 12, 16.
- Of servant. See MASTER AND SERVANT, 4, 9, 14, 18, 20; TRIAL, 11.
- Comparative. See NEGLIGENCE, 2.
- Law of case. See APPEAL AND ERROR, 52.

CORPORATIONS:

- Stock held as collateral. See PLEDGE, 1.
 - Trustee, selling all his stock. See APPEAL AND ERROR, 3.
1. CORPORATIONS—DISINCORPORATION—BONA FIDE INTENT TO DISCONTINUE BUSINESS—FRAUD ON MINORITY STOCKHOLDERS. Bal. Code, § 4275, providing that any corporation may dissolve and disincorporate by application to the superior court upon a vote of two-thirds of the stockholders, authorizes a disincorporation only upon a bona fide intent upon the part of the people interested to discontinue the business, and does not, as against the objection of a single stockholder, authorize a dissolution of a prosperous company for the purpose of enabling the majority stockholders to get control of the business by a sale of the property and the organization of a new corporation, with the same powers, and to continue the same business. *Thets v. Spokane Falls Gas Light Co.*..... 23
2. SAME—ACTUAL INTENT TO DISSOLVE—WHEN NOT SHOWN. Actual intent to dissolve a corporation by proceedings to disincorporate is not shown, where the company was prosperous, and a syndi-

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- cate of the majority stockholders attempted to purchase all the stock, and organized a new company of slightly different name, to operate in the same town, with the same powers and substantially the same owners, and the object was plainly to get rid of a stockholder who had refused to sell his stock. *Id.*..... 23
3. SAME—SUFFICIENCY OF EVIDENCE. A dissolution of a corporation by proceedings to disincorporate by a two-thirds vote of the stockholders is not warranted by the fact that one object was to secure a larger bonded indebtedness at a less rate of interest, when the majority owners of the stock were also owners of the bonds and consented to release the same upon payment of the cash. *Id.* 23
4. SAME—CONCLUSIVE EVIDENCE OF FRAUD. That such a dissolution was a scheme in the interests of the majority stockholders is conclusively shown by the testimony of their representative to the effect that they were not out here for philanthropy and would not be reducing the rate of interest if it were a benefit to the minority stockholders. *Id.*..... 23
5. CORPORATIONS—STOCK—TRUSTEE—DISPOSAL OF STOCK HELD BY. A trustee of a corporation, by a sale of all his stock therein, *ipso facto* ceases to be a trustee, in view of Bal. Code, § 4255, requiring trustees to be stockholders. *Oudin & Bergman Fire Clay etc. Co. v. Conlan.*..... 216
6. SAME—CONTROL OF PROPERTY—STOCKHOLDER'S RIGHT AS AGAINST OFFICERS. A mere stockholder in a corporation has no right to the possession or control of the property as against a trustee who is also an officer. *Id.*..... 216
7. PROCESS—SERVICE ON FOREIGN CORPORATION—RAILROADS—BUSINESS IN THIS STATE. A foreign corporation cannot be required to answer in an action *in personam* in this state, unless it is doing business in this state, and no distinction is to be made between railroad and other corporations. *Rich v. Chicago B. & Q. R. Co.*.. 14
8. CORPORATIONS—FOREIGN RAILROAD—AGENT TO SOLICIT BUSINESS—DOING BUSINESS IN STATE—PROCESS—SERVICE ON AGENT. Where the only business done in this state by a foreign railroad company is to maintain an advertising agent authorized only to solicit routing via its line, without power to sell tickets, make rates, or obligate the company in any way, and no person within the state is designated on whom process may be served, it cannot be required to answer in an action *in personam*, and service upon such an agent is properly quashed. *Id.*..... 14

COSTS:

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- Bond for, sureties as parties to suit. See **APPEAL AND ERROR**, 9-12.
- On appeal. See **APPEAL AND ERROR**, 50.
- Taxation, review of. See **APPEAL AND ERROR**, 30.
- 1. **COSTS—ATTORNEY'S FEES—ACTION FOR PARTITION.** In an action for a partition of real estate, attorney's fees outside the statutory fee cannot be allowed or taxed as part of the costs or disbursements provided for by Bal. Code, § 5604, especially in view of the statute leaving attorney's fees to the agreement of the parties. *Legg v. Legg* 132
- 2. **COSTS—ATTORNEY'S FEES—LIMITED BY STATUTE TO TEN DOLLARS.** In an action by a resident taxpayer to restrain the payment of warrants, it is error to allow an attorney's fee of \$500 upon giving judgment for the plaintiff, Bal. Code, § 5172, providing for but \$10 therefor to be taxed as costs. *Criswell v. Directors School Dist. No. 24*..... 420
- 3. **SAME—SECURITY FOR COSTS—DELAY.** An action will not be dismissed for delay on the part of one of the non-resident plaintiffs in filing security for costs, where the security was in fact given, since there was no prejudice thereby. *Johnston v. Gerry*..... 524
- 4. **APPEAL—COSTS—DISBURSEMENTS FOR MAKING TRANSCRIPT—PER FOLIO CHARGE.** In taxing the costs of an appeal, not more than ten cents per folio can be allowed as disbursements for stenographer's fees in making a transcript of the evidence, under Laws 1893, p. 132. *Nelson v. McLellan*..... 181
- 5. **SAME—TAXATION OF COSTS—ESTIMATING FOLIOS IN TRANSCRIPT.** Where no actual count of the folios was made, the clerk's estimate made by counting the folios on several pages and taking the average should prevail over a general average for similar class of work. *Id.*..... 181

CO-TENANTS:

- Award to. See **PARTITION**, 1, 2.

COUNTIES AND COUNTY OFFICERS:

- Appeal, exemption from bond. See **APPEAL AND ERROR**, 19.
- Judgments against, warrant for. See **APPEAL AND ERROR**, 19.
- Treasurer, duties. See **TAXATION**, 6, 7, 18.
- Highways, control of. See **HIGHWAYS**, 1.

COURTS:

- Jurisdiction to affirm award. See **ARBITRATION AND AWARD**, 3.
- Judge pro tempore. See **JUDGES**.

COURTS—CONTINUED.

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1. COURTS—JURISDICTION TO SET ASIDE ORDERS OF TERRITORIAL PROBATE COURT—JUDGMENTS—VACATION AT SUIT OF MINOR AFTER ATTAINING MAJORITY. Under Bal. Code, § 5153, authorizing the superior court to vacate any judgment for error shown by a minor within twelve months after arriving at full age, and Const., art. 27, § 10, providing that all proceedings in the territorial probate courts shall pass into the jurisdiction of the superior courts, the superior court has complete jurisdiction to review errors of the old probate court, at the suit of minors brought within twelve months after arriving at full age. *Ball v. Clothier*..... 299
2. SAME—BILL OF REVIEW WITHOUT STATUTORY AUTHORITY. In such a case, the court would have jurisdiction to review such a judgment for apparent error or fraud by bill of review, whether expressly authorized by statute or not. *Id.*..... 299
3. COURTS—JURISDICTION—TAXATION—SPECIAL PROCEEDINGS TO ENFORCE LIEN—PRESUMPTIONS IN AID OF JURISDICTION—VACATION OF JUDGMENTS. Where special and summary powers are conferred upon courts of general jurisdiction for the enforcement of tax liens, the judgment therein imports the same verity, and raises the same presumption as to the facts essential to jurisdiction, as in the case of judgments in the ordinary course of the common law by a court of general jurisdiction, there being no valid reason for any distinction, under our constitutional provisions respecting the jurisdiction of superior courts; and such a judgment will not be vacated because all the steps conferring jurisdiction do not appear in the record. *Taylor v. Huntington*..... 455

COVENANTS:

- To pay taxes. See LIMITATION OF ACTIONS, 4.

CREDITORS:

- Sale of goods in bulk. See SALES, 1.
- Equitable assignment of policy. See INSURANCE, 4, 5.

CRIMINAL LAW:

- Prostitutes, class legislation. See CONSTITUTIONAL LAW, 1; STATUTES, 1, 2.
- Excessive sentence, review. See APPEAL AND ERROR, 31.

I. INFORMATION AND DEFINITIONS.

1. CRIMINAL LAW—INFORMATION—BURGLARY—ATTEMPT TO COMMIT—DISTINGUISHED FROM POSSESSION OF TOOLS WITH INTENT. An information charging accused with an attempt to commit the

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crime of burglary "having in his possession" certain implements of burglary, charges a felony under Bal. Code, § 7437, relating to attempts, and not merely the misdemeanor defined by Bal. Code, § 7106, in having such implements in possession with intent to commit such offense, since an attempt is charged as distinguished from mere intent, and the latter section expressly applies only where the circumstances do not amount to an attempt; and the allegation respecting possession of tools is surplusage. *State v. Garbe* 335

2. CRIMINAL LAW—FALSE PRETENSES—INFORMATION—SUFFICIENCY—STATING FACTS IN LANGUAGE OF STATUTE. In a prosecution for obtaining money by false pretenses, an information is sufficient where it sets out in the language of the statute that the defendant obtained from one H the sum of \$20, the property of H, by unlawfully, feloniously, etc., pretending to the agent of H that a certain paper, purporting to be a bank bill on a certain bank, was a good and valid bill of the value of \$20, whereas it was, as defendant well knew, a false token and was of no value, since a statement in the language of the statute defining the crime is sufficient where the statute states the facts so that the defendant may have notice of that with which he is charged; and it is not necessary to allege the means used or in what particulars the token was false. *State v. Ryan*..... 597
3. SAME—DESCRIPTION OF BANK NOTE. The bank note is sufficiently described without setting it out *in hæc verba*, where its nature, character, and contents are stated. *Id.*..... 597
4. SAME—RELIANCE UPON FALSE PRETENSES. In such a case it is unnecessary to allege that the false pretenses were relied upon, where it is alleged that the property was obtained by means thereof. *Id.*..... 597
5. SAME—ALLEGING VALUE OF MONEY. Nor is it necessary to allege the value of the twenty dollars. *Id.*..... 597
6. INCEST—KNOWLEDGE OF RELATIONSHIP—CONSTITUTIONAL LAW—DUE PROCESS—INFORMATION SUFFICIENT WITHOUT CHARGING SCIENTER. Bal. Code, §§ 7228, 7229, defining the crime of incest without including actual knowledge on the part of the defendant of his relationship to the *particeps criminis*, does not violate the fourteenth amendment as an attempt to deprive one of liberty without due process of law; and an information thereunder is sufficient without alleging *scienter*. *State v. Glindemann*..... 221
7. CRIMINAL LAW—MURDER—INFORMATION—SUFFICIENCY. An information charging in the language of the statute that the accused purposely and of his deliberate and premeditated malice

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killed the deceased by purposely, etc., shooting and mortally wounding him with a pistol, is sufficient to sustain a conviction of manslaughter. *State v. Yandell*..... 409

8. RECEIVING STOLEN PROPERTY—INFORMATION—SUFFICIENCY. An information charging that the defendant bought and received "stolen property," knowing that it was stolen property, is sufficient without further alleging as a fact that it was stolen, since the inference that it was stolen is in substance the statement of a fact, and the information enables a person of common understanding to know what was intended. *State v. Druztman*, 257

II. EVIDENCE.

9. HOMICIDE—EVIDENCE—SUFFICIENCY. The evidence is sufficient to warrant a conviction of murder in the first degree where the circumstances were such that there is no possible doubt that the defendant did the killing, although no one saw it, and the motive of jealousy is shown, and where there is no evidence of insanity (defendant's only defense), except his own statements to the effect that he did not know what he was doing, and the statements of two or three witnesses that he "looked wild" and as though he was "going to get on a drunk." *State v. Clark*..... 485
10. HOMICIDE—EVIDENCE OF DEFENDANT'S INSANITY—COMPETENCY UNDER PLEA OF SELF-DEFENSE. In a prosecution for a homicide it is not prejudicial error to exclude evidence of an adjudication of insanity and a discharge from the hospital as improved, where there was no plea of insanity, the defense being self-defense, especially where defendant was afterwards allowed to prove that he had been confined in the asylum on a charge of insanity. *State v. Stockhammer* 262
11. HOMICIDE — SELF-DEFENSE — NECESSITY OF WARNING—INSTRUCTIONS. In a prosecution for a homicide an instruction as to the right of the defendant to take the life of another in self-defense is properly qualified by adding that it was the duty of the defendant to first warn his assailant to desist from his attack, unless he was justified in believing that he had no time to give such warning. *Id* 262
12. SAME—REASONABLENESS OF BELIEF THAT LIFE IS IN DANGER. An instruction as to the right of self-defense if the defendant believed his life is in danger, is properly qualified by adding "if he has reason to believe" in such fact since it is only a reasonable belief that will warrant the act. *Id*..... 262

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III. TRIAL—INSTRUCTIONS.

13. TRIAL—VERDICT ON CONFLICTING EVIDENCE NOT SET ASIDE. A verdict of guilty will not be set aside upon conflicting testimony where the evidence for the state warrants the verdict. *State v. Druzinman* 257
14. JURORS—EXAMINATION AS TO GENERAL QUALIFICATIONS—WAIVER BY FAILING TO CHALLENGE. In a criminal prosecution it is not error to require the attorney for the state to examine the jurors as to their general qualifications, since the statute providing therefor is simply declaratory of the rights of the parties, and either side may waive the qualifications, and cannot take advantage of any disqualification unless the juror is challenged for the specific cause, and exception taken. *State v. Clark*..... 485
15. CRIMINAL LAW—TRIAL—SEPARATION OF THE JURY—CONSENT OF DEFENDANT. A case will not be reversed because of the separation of the jury without the consent of the defendant, when the counsel for defendant consented thereto in the presence and hearing of the defendant. *State v. Stockhammer*..... 262
16. SAME—ADMONITION AS TO DUTIES UPON ADJOURNMENT. It is not prejudicial error to fail to admonish the jury as to its duties on each adjournment where the admonition had been once given. *Id* 262
17. CRIMINAL LAW—MOTION FOR ACQUITTAL—SUFFICIENCY OF EVIDENCE. Where there was sufficient testimony introduced by the state to warrant a conviction if uncontradicted, a dismissal or verdict of acquittal should not be directed. *Id*..... 262
18. CRIMINAL LAW—HOMICIDE—INSTRUCTIONS AS TO DEGREES OF OFFENSE—REPETITION. It is not error to repeat instructions defining murder in the first and second degree, as tending to intensify the crime as murder, where the repetition consists in giving several instructions requested by the defendant which more fully pointed out the distinction between the different degrees. *State v. Clark*..... 485
19. SAME—INSANITY AS DEFENSE—BURDEN OF PROOF UPON DEFENDANT—INSTRUCTIONS AS TO REASONABLE DOUBT. In a prosecution for murder, where the defense is insanity, the burden is upon the defendant to establish the defense by a preponderance of the evidence, and hence it is proper to refuse to instruct the jury that they may acquit if they entertain a reasonable doubt as to the sanity of the defendant. *Id*..... 485
20. SAME—INSTRUCTIONS AS A WHOLE SUBMITTING DEFENSE OF INSANITY. It is not error to instruct the jury to convict if they find beyond a reasonable doubt that defendant committed the

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crime as charged in the information, in that it eliminated the defense of insanity, where other instructions fully and fairly instructed the jury upon such defense, since all the instructions must be read together. *Id.*..... 485

21. TRIAL—INSTRUCTIONS—GENERAL CHARGE. It is not error to refuse requested instructions which are covered in the general charge. *Id.* 485

22. RECEIVING STOLEN PROPERTY—KNOWLEDGE THAT SAME WAS STOLEN—INSTRUCTIONS. Upon a prosecution for receiving stolen goods, it is proper to instruct that defendant's knowledge of the theft need not be direct, and that it is sufficient if the circumstances were such as to make the defendant believe that they were stolen. *State v. Druzinman*..... 257

CUSTOM:

- To guard machinery. See MASTER AND SERVANT, 11-13.
- Manner of operating machine. See MASTER AND SERVANT, 14.

DAMAGES:

See MASTER AND SERVANT; MUNICIPAL CORPORATIONS; NEGLIGENCE.

- Contractors, for stopping work on building. See MECHANICS' LIENS, 2-4.
- Double. See FORCIBLE ENTRY AND DETAINER, 2.
- Expenditures of injured minor. See INFANTS, 2.
- For pain and suffering, proof. See PLEADINGS, 10.
- For services of wife as nurse. See HUSBAND AND WIFE, 2.
- Verdict for, arrived at by average. See TRIAL, 12.

1. DAMAGES—PROSPECTIVE SUFFERING AND LOSS. In an action for personal injuries an instruction that the jury may take into consideration the probable amount of future pain, suffering, and loss which the plaintiff would sustain, does not authorize speculative damages, since that is equivalent to charging that there may be a recovery therefor if they were "reasonably certain." *Gallamore v. Olympia* 379
2. SAME. Such an instruction would not be erroneous in any event if construed to define the measure of the amount of damages rather than the degree of proof necessary to any recovery. *Id.* 379
3. DAMAGES—WHEN EXCESSIVE. A verdict for \$8,040 for personal injuries sustained by reason of a fall through a hole in the sidewalk is excessive, when it is clear that the state of plaintiff's health was due in part to surgical operations, one of which oc-

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curring prior to the injury, and which were alone sufficient to account for much of her ill health; and the same should be reduced to \$5,000. *Id* 379

4. **VERDICT—DAMAGES FOR PERSONAL INJURIES—WHEN EXCESSIVE.**
A verdict for \$12,500 for injuries sustained by a brakeman in a collision is excessive where there was no loss of limb or disfigurement, and no certainty of permanent injury, but only a weakness of the attachment of the tissue and muscles of the pelvic bone, which did not disqualify plaintiff from pursuing other callings which he had previously pursued; and the same should be set aside unless reduced to \$8,000. *Morrison v. Northern Pac. R. Co.* 70
5. **SALES—FAILURE OF VENDOR TO DELIVER—MEASURE OF DAMAGES.**
Upon a sale of personal property and payment of the purchase price, the measure of damages for failure of the vendor to deliver the property is its market value at the time of the default. *Belden v. Krom* 184

DANGEROUS PREMISES:

— Trap door. See NEGLIGENCE, 1.

DEATH:

— Suspension of statute. See LIMITATION OF ACTION, 6.

1. **DEATH BY WRONGFUL ACT—RIGHT OF ACTION—HEIRS LIMITED TO WIDOW AND MINOR CHILDREN—STARE DECISIS.** The supreme court having six years ago adopted a construction of the statute respecting damages for a death by wrongful act whereby "heirs" entitled to bring the action was held not to include collateral heirs but only the widow and children, and having since adhered to the rule, and the legislature having since convened three times without making any change, the question should be considered at rest and the rule adhered to, notwithstanding that, as an original proposition, the court, as now constituted, would probably have adopted a different construction. *Manning v. Tacoma R. & Power Co.* 406

DEED:

- As a mortgage. See FRAUDS, STATUTE OF, 2.
- Disaffirmance of. See INFANTS, 1.
- Good faith, presumption. See HUSBAND AND WIFE, 1.

DEMAND:

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- Before suit, variance from complaint. See MUNICIPAL CORPORATIONS, 10.
- Before suit, necessity. See MUNICIPAL CORPORATIONS, 21.

DEMURRER:

- See PLEADINGS, 4.

DESCENT AND DISTRIBUTION:

- No presumption in favor of heirs. See WILLS, 2.

DISMISSAL:

- Of actions, voluntary. See ACTIONS, 2.
- Of appeal. See APPEAL AND ERROR, 3, 4, 15, 35.

DISSOLUTION:

- Of corporation, fraud. See CORPORATIONS, 1-4.

DIVORCE:

- Division of property. See COMPROMISE, 6.
- Vacation for fraud. See APPEAL, 1.

1. **DIVORCE—VACATION OF DECREE ON GROUND OF FRAUD—SUFFICIENCY OF EVIDENCE.** Where a decree of divorce is sought to be vacated on the ground that plaintiff fraudulently stated the defendant's address at O, when he knew it to be at C, whereby plaintiff was deprived of an opportunity to appear, findings refusing to vacate the decree will not be disturbed where it appears that the parties had been separated for more than twenty years, that C was formerly the defendant's address, that O was a new town near by, that plaintiff had lived in the farther west, and the evidence failed to show that he knew O to be defendant's address. *McDonald v. McDonald* 293
2. **SAME—DISCRETION OF LOWER COURT—ACTUAL NOTICE OF SUIT—NEGLECT OF DEFENDANT.** The vacation of a judgment of divorce on the ground of fraud involves a matter of discretion that will not be interfered with on appeal where it appears that the defendant had actual knowledge of the pendency of the action about one month before the decree was entered and the injury might have been due to her own neglect. *Id.*..... 293

DURESS:

- Payment under. See PLEADINGS, 8.

EJECTMENT:

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- Leased premises. See LANDLORD AND TENANT, 1-4.
 - Title of plaintiffs. See HUSBAND AND WIFE, 1.
 - Title of plaintiffs, unity of. See PARTIES, 2.
 - Title through lease, failure of proof. See ASSIGNMENT, 1.
 - Streets. See MUNICIPAL CORPORATIONS, 6.
 - Writ of restitution. See LANDLORD AND TENANT, 4.
1. **EJECTMENT—PARTIES—NONRESIDENTS NOT CONSENTING TO ACTION.** In an action of ejectment commenced by part of the heirs interested in recovering the land, the other heirs, who are nonresidents and whose consent to bringing the action could not be procured, are proper but not necessary parties defendant in order that they might, if they saw fit, have their rights determined. *Johnston v. Gerry* 524
 2. **EJECTMENT—LEGAL TITLE—WHEN NOT ESSENTIAL.** Under Bal Code, § 5500, changing the common law rule, ejectment may be maintained against a party in possession holding the legal title, where the plaintiffs have an equitable title or interest in, and right to the possession of, the property. *Id.* 524
 3. **EJECTMENT—QUIETING TITLE—ATTEMPT TO STATE SEVERAL CAUSES OF ACTION—ELECTION BETWEEN.** Where plaintiffs undertake to state two separate causes of action for the recovery of real estate, one for equitable relief to remove a cloud from the title, without alleging who was in possession, and the other to recover possession alleging that the defendant is in, and unlawfully withholds, possession, it is error to require the plaintiff to elect between the two causes on the theory that the equitable cause is not maintainable without possession, and so is inconsistent with the other, since the first cause does not allege possession in the plaintiff, and it was unnecessary under the statute to split up the action into legal and equitable causes, and in fact but one cause is stated. *Brown v. Calloway* 175

ELECTION:

- Between causes of action. See EJECTMENT, 3; PLEADINGS, 6.
- Not to sue, dismissal. See ACTIONS, 2.

EMINENT DOMAIN:

- Award of damages, city warrant for. See MUNICIPAL CORPORATIONS, 7.
 - Award, collected by cotenant. See PARTITION, 1, 2.
1. **AWARD—DECREE A JUDGMENT—INTEREST.** In proceedings to condemn land under the right of eminent domain, the decree of

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condemnation is a judgment drawing interest at the legal rate.

State ex rel. Donofrio v. Humes..... 347

2. SAME—INTEREST ON AWARD REGARDLESS OF TAKING POSSESSION—FAILURE TO DISCONTINUE WITHIN TWO MONTHS—ELECTION TO ABIDE BY AWARD. A city cannot escape payment of interest upon a decree for the value of land condemned, by the fact that it has not taken possession of the land, where it has failed to discontinue the proceedings within two months as required by Bal. Code, § 822, since thereby it elects to abide by the award and appropriate the property. *Id.*..... 347
3. SAME—INTEREST ON AWARD—RENTS AND PROFITS COLLECTED BY OWNERS TO BE DEDUCTED FROM INTEREST. But where the owner has remained in possession of the land and received the rents and profits therefrom, he is not entitled to interest on the judgment until he makes an accounting and deducts the rents and profits received by him. *Id.*..... 347

EQUITY:

- Accounting. See ATTORNEY AND CLIENT, 4; TRUST, 1.
- Fraudulent conveyance. See TRUSTS, 1.
- Remedy of pledgee of stock. See PLEDGE.

ESTOPPEL:

- By application of tender. See COMPROMISE, 6.
 - By judgment. See TAXATION, 19.
 - By dismissal of action, election. See ACTIONS, 2.
 - By local assessments. See MUNICIPAL CORPORATIONS, 8, 9.
 - Infants, to avoid sale. See EXECUTORS AND ADMINISTRATORS, 3.
1. ESTOPPEL—PLEADING—FACTS SUFFICIENT WITHOUT CONCLUSION. While an estoppel must be pleaded, it is sufficient to allege the facts from which the estoppel arises, without alleging the conclusion that the party is estopped. *Anderson v. New York Life Ins. Co.* 616

EVIDENCE:

- Agency. See ATTORNEY AND CLIENT, 1; PRINCIPAL AND AGENT, 2; SPECIFIC PERFORMANCE, 3.
- Compromise, sufficiency. See COMPROMISE, 1.
- Cumulative. See NEW TRIAL, 4; EVIDENCE, 8.
- Custom. See MASTER AND SERVANT, 11-13.
- Deed, burden of proof. See HUSBAND AND WIFE, 1.

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- Fraud, in dissolution of corporation. See CORPORATIONS, 1-4.
In sale of lands. See SPECIFIC PERFORMANCE, 2. In securing insurance. See INSURANCE, 1-5. In securing divorce. See DIVORCE, 1-2.
 - Guardian, appointment, sufficiency. See GUARDIAN AND WARD, 1.
 - Harmless error in admission. See APPEAL AND ERROR, 37, 42-48; CRIMINAL LAW, 10; PLEADINGS, 3; TRIAL, 2.
 - Homicide. See CRIMINAL LAW, 9-12.
 - Insanity, as defense, burden of proof. See CRIMINAL LAW, 17.
 - Journal entry. See JUDGMENTS, 1, 3.
 - Judgment, notice of, sufficiency. See JUDGMENTS, 4.
 - Mistake. See COMPROMISE, 3-5; VENDOR AND PURCHASER, 5.
 - Negligence, as to sidewalks, sufficiency. See MUNICIPAL CORPORATIONS, 11, 12, 14-16. Of master, sufficiency. See MASTER AND SERVANT, 4, 7-9, 16-17. Of contributory negligence, sufficiency. See MASTER AND SERVANT, 4, 8, 14, 18; MUNICIPAL CORPORATIONS, 16. Of owner of premises, competency. See NEGLIGENCE, 1. Of railroad, passing of trains. See MASTER AND SERVANT, 19.
 - Objections to. See PLEADINGS, 5.
 - Option to purchase. See BROKERS, 1-3.
 - Oral, aliunde the record. See MUNICIPAL CORPORATIONS, 5.
 - Oral, part performance. See FRAUDS, STATUTE OF, 1, 4, 5.
 - Oral, varying or explaining writing. See APPEAL AND ERROR, 6; BROKERS, 3; PRINCIPAL AND AGENT, 5; VENDOR AND PURCHASER, 1, 2.
 - Ordinances, passage, sufficiency. See MUNICIPAL CORPORATIONS, 1-5.
 - Rebuttal, competency. See MASTER AND SERVANT, 5, 13; TRIAL, 2.
 - Tax books, competency. See TAXATION, 5-8.
 - Transaction with deceased. See WITNESSES, 1.
 - Value of land, competency. See PRINCIPAL AND AGENT, 6.
 - Water rights, materiality. See IRRIGATION, 3.
 - Weight, instructions. See TRIAL, 8.
 - Wills, burden of proof. See WILLS, 1.
1. EVIDENCE—CONCLUSION OF WITNESS. It is not error to sustain an objection to a question calling for the conclusion of the witness as to the feeling of another person which prompted an act, where the witness was permitted to testify to the act, since that fact was all he could properly testify to. *State v. Stockhammer*... 262

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2. **SAME.** In a cause tried by a court without a jury, the fact that witnesses undertook to give reasons in support of positive statements, is not objectionable, where they can be separated. *Tilden v. Gordon & Co.*..... 92
3. **EVIDENCE—DIAGRAM OF PREMISES.** In an action for negligence in the maintenance of dangerous premises, a plat which is a substantially correct diagram of the situation is admissible to illustrate the testimony of the witness. *Franklin v. Engel.*..... 480
4. **EVIDENCE—ORAL STATEMENTS RESPECTING WRITTEN CONTRACT.** It is not error to permit plaintiff to testify that a written contract was orally agreed to ten days before its execution when it tended to explain an apparent discrepancy in his testimony. *Hindle v. Holcomb* 336
5. **SAME.** Where a written contract is not in dispute, conversations leading up to it are inadmissible. *Id.*..... 336
6. **SAME—ORAL EVIDENCE EXPLAINING WRITTEN POWER OF ATTORNEY.** A cablegram to an attorney in fact directing him to take charge and make the best settlement for creditors possible, is not inadmissible as varying the terms of the written power, as it only tends to explain it, if any explanation was necessary. *Muir v. Westcott* 463
7. **EVIDENCE—VARYING WRITING BY PAROL—CONTEMPORANEOUS ORAL AGREEMENT—ORAL SALE OF TIMBER.** Where a written bill of sale of a shingle mill makes no mention of standing timber, evidence of an oral sale of such timber made at the same time as the purchase of the mill does not contradict or vary the terms of the writing and is admissible, since the sale of the timber is not embraced in the writing. *Welever v. Advance Shingle Co.*.... 331
8. **INCEST—DEFENSE OF INSANITY—EVIDENCE—RECORD OF GUARDIANSHIP—EXCLUSION OF CUMULATIVE TESTIMONY.** Upon the defense of insanity the exclusion of the record of the appointment of a guardian for the defendant as of unsound mind is not prejudicial error, where the record of the actual adjudication of insanity preceding the appointment was admitted, since it could have been no more than cumulative evidence. *State v. Glindemann* 221
9. **SAME—WIFE'S APPOINTMENT AS GUARDIAN—COMPETENCY.** Such record, showing that defendant's wife was still his guardian, is not admissible to show that she, who instigated the prosecution, was in duty bound to look after his defense, since her attitude can be better shown by other evidence. *Id.*..... 221

EXCEPTIONS:

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See **APPEAL AND ERROR.****EXECUTION:**— Levy on tools of trade. See **EXEMPTIONS**, 1, 2.**EXECUTORS AND ADMINISTRATORS:**— Bond upon distribution, sureties. See **APPEAL AND ERROR**, 11.— Presenting claims. See **LIMITATION OF ACTIONS**, 5.— Sale to pay debts. See **HOMESTEADS**, 1-4.

1. **EXECUTORS AND ADMINISTRATORS—SALES—NECESSITY OF NOTICE TO MINOR HEIRS.** An administrator's sale of real estate made under order of court is void when the minor heirs interested in the estate were not represented by a general guardian, and no guardian *ad litem* was appointed for them, and no notice given them as required by Code 1881, § 1497. *Ball v. Clothier*..... 299
2. **SAME—CURATIVE STATUTE—DEFECTS RELATING TO JURISDICTION.** Bal. Code, § 6474, intended to cure defects and irregularities in administrators' sales, does not cure defects relating to the jurisdiction of the court over the persons of the parties in interest, owing to the failure to give notice to the minor heirs or to appoint a guardian for them, the statutory requirements therefor being mandatory. *Id.*..... 299
3. **SAME—ESTOPPEL BY PETITION TO DISCHARGE ADMINISTRATOR AND FOR DISTRIBUTION—SALE BY PREDECESSOR WHOSE ACCOUNT WAS SETTLED DURING MINORITY.** Where the final account of former administrators involved an illegal sale of real estate, void for want of notice to minor heirs, and the succeeding administrator collected no money and had done nothing and filed no account during his administration, the minors upon arriving at majority are not estopped to question the validity of the sale by joining in a petition to discharge the last administrator and accepting a distribution of the estate then remaining, which consisted wholly of real estate, when it does not appear that they were informed of their rights or accepted the same in lieu of the whole, and there was no changed relation to the property affected. *Id.*..... 299
4. **SAME—PURCHASERS IN GOOD FAITH AT ADMINISTRATOR'S SALE—LIEN FOR AMOUNT OF PURCHASE PRICE AND TAXES—NONE FOR IMPROVEMENTS.** Upon setting aside a void administrator's sale at the suit of heirs after arriving at full age, purchasers in good faith should be allowed a lien upon the property for the amount of the purchase price paid to and received by the estate, with legal interest, and also for the taxes paid by them, but not for

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permanent improvements, since under Bal. Code, § 5511, the value of improvements can only be set off against damages. *Id.*..... 299

EXEMPTIONS:

See HOMESTEADS.

1. **EXEMPTIONS—PRINTING PRESS AND TOOLS—FAILURE TO DEMAND APPRAISEMENT—RELEASE OF EXECUTION.** Where, upon the levy of an execution upon a printing press and printing outfit, duly claimed by the head of a family, a job printer, as exempt as his tools and instruments of trade, the plaintiff does not demand an appraisement, it is the duty of the officer to release the levy. *American Paper Co. v. Sullivan*..... 391
2. **SAME—RELEASE OF EXECUTION—MANDAMUS—REMEDY IN ORIGINAL ACTION—SUBMISSION TO JURISDICTION.** Where an officer refuses to release exempt property levied on under execution, and the defendant applies to the court in the original action for an order of release by the filing of an affidavit sufficient in all particulars for a mandamus, an appearance by the plaintiff asking a dismissal, or in the alternative for a continuance of the hearing, which was granted, submits the matter to the jurisdiction of the court in the original action and after contesting the matter at the hearing as in the case of mandamus proceedings the plaintiff can not claim that the only remedy was by mandamus. *Id.*..... 391

FALSE PRETENSES:

See CRIMINAL LAW, 2-5.

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FORCIBLE ENTRY AND DETAINER:

— Notice to quit. See LANDLORD AND TENANT, 5.

1. **UNLAWFUL DETAINER—AFFIRMATIVE DEFENSE OF AGREEMENT TO CONVEY—MATTERS ALREADY LITIGATED—EQUITABLE DEFENSES INADMISSIBLE.** In an action of unlawful detainer brought against a tenant in possession holding over after notice to quit, an affirmative defense, which sets up an agreement to convey the premises to the defendant, with the right of possession until conveyance is made, is properly excluded where it appears that the matters involved had already been litigated and decided adversely to defendant; and also, because it is an equitable defense, which can not be interposed in an action of unlawful detainer. *Bond v. Chapman* 606

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2. **SAME—DOUBLE DAMAGES.** In an action of unlawful detainer, Bal. Code, § 5542, authorizes the entry of judgment for double damages where the unlawful detainer is made after default in the payment of rent *Id.*..... 606

FORECLOSURE:

- Of chattel mortgages, defenses. See **COMPROMISE**, 5.
- Of tax liens. See **TAXATION**, 4-9, 15-21.
- Of mechanics' liens. See **MECHANICS' LIENS**.
- Of mortgage. See **MORTGAGES**, 1; **APPEAL AND ERROR**, 2.

FORFEITURE:

- Of certificate. See **BENEFICIAL ASSOCIATIONS**, 3.

FRAUD:

- Agent, against principal. See **PRINCIPAL AND AGENT**, 6, 10-14.
- Builder and architect, evidence. See **SCHOOLS**, 3, 4.
- Divorce. See **APPEAL AND ERROR**, 1; **DIVORCE**, 1, 2.
- Insurance agent. See **INSURANCE**, 1-6.
- Payment under duress. See **PLEADING**, 8, 9.
- Sale of lands. See **SPECIFIC PERFORMANCE; VENDOR AND PURCHASER**, 1-4.
- Stockholders, against minority. See **CORPORATIONS**, 1-4.

FRAUDS, STATUTE OF:

1. **FRAUDS, STATUTE OF—POSSESSION TO TAKE CASE OUT OF OPERATION OF STATUTE.** Specific performance should not be decreed where the contract was not acknowledged as required by the statute of frauds, and the plaintiff did not enter into possession of the premises so as to take the case out of the operation of the statute. *Sherlock v. Van Asselt*..... 141
2. **VENDOR AND PURCHASER—ADVANCEMENT OF PRICE FOR BENEFIT OF ANOTHER—RESULTING TRUST—DEED AS A MORTGAGE.** Where a daughter advanced the price, \$1,800, for premises purchased by her parents, taking a deed in her own name, under an oral agreement whereby they agreed to repay the purchase price within two years, with \$15 per month as compensation for the loan, she occupies the double position of trustee of a resulting trust and mortgagee, holding the title for her parents and as security for the amount advanced. *Borrow v. Borrow*..... 684
3. **SAME—STATUTE OF FRAUDS—PAROL EVIDENCE.** Such a resulting trust is excepted from the operation of the statute of frauds

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and may be proved by parol evidence, where there is mutual obligation to pay and receive the money advanced. *Id.*..... 684

4. **SAME—PART PERFORMANCE—POSSESSION AS TENANTS.** The fact that the purchasers were in possession as tenants of the former owner at the time of the agreement cannot be urged to show that there was no taking of possession amounting to part performance to take the case out of the statute of frauds, where it further appears that, relying upon their agreement, the parties purchased and paid for an adjoining lot for use in connection with the premises, made improvements on the premises, and paid interest on the loan, such expenditures and change in the situation creating an equitable estoppel against the plea of the statute of frauds requiring contracts for the purchase of real estate to be in writing. *Id.*..... 684

5. **SAME—AGREEMENT NOT TO BE PERFORMED WITHIN ONE YEAR.** Such a trust relation and part performance defeats the claim that the agreement was an oral contract not to be performed within one year. *Id.*..... 684

FRAUDULENT CONVEYANCES:

- Blind Mortgage. See TRUSTS, 1.
- Deed, Presumption. See HUSBAND AND WIFE, 1.

GUARDIAN AND WARD:

- Appointment, competency. See EVIDENCE, 9.
- Appointment, review of. See CERTIORARI, 1.
- Mandatory provision for. See EXECUTORS AND ADMINISTRATORS, 1, 2.

1. **GUARDIAN AND WARD—APPOINTMENT OF GUARDIAN FOR ORPHAN** —EVIDENCE — SUFFICIENCY — CLAIM OF RELATIVES — INTERESTS OF WARD CONTROLLING—DECISION OF LOWER COURT—REVERSAL WHERE TESTIMONY IS UNCONTRADICTED. Where, for three years before her death, a widow had left her infant child in the care of W and his wife, who were living in good circumstances in a city with good school, church, and social advantages, and who had shown themselves peculiarly adapted to the care and custody of the child, to whom they had become greatly attached, and the child, although of non-consenting age, desired to remain with them, it is error, on the death of the mother, to refuse to appoint W guardian of the infant, and to appoint as guardian an aunt living in the mountains in Idaho, who had never before shown any interest in the child, although a prosperous person of good character, consanguinity alone appearing to be the only reason

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entitling her to the preference; and the evidence being brief and practically uncontradicted, the supreme court will not hesitate to reverse the lower court, since the interests of the ward are controlling, and relatives have no legal right to the appointment. *Willet v. Warren*..... 647

HABEAS CORPUS:

1. HABEAS CORPUS—SUFFICIENCY OF INFORMATION—RULINGS ON, NOT REVIEWABLE. Rulings of the trial court upon the sufficiency of an information which do not go to the jurisdiction will not be inquired into in habeas corpus proceedings, since they are reviewable upon appeal. *State ex rel. Zenner v. Graham*..... 81

HEIRS:

— Right of action. See DEATH, 1.

HIGHWAYS:

1. HIGHWAYS—OBSTRUCTIONS BY ABUTTER TO GAIN ACCESS TO PREMISES—COMPLAINT TO ENJOIN REMOVAL—SUFFICIENCY. The owner of property abutting upon a public highway filled across tide lands, who has erected a building on his abutting property, flush with the street, and four feet higher than a bicycle path constructed on that side of the street, has no right to build a sidewalk from his property over said bicycle path, with inclines accomodating the use of the bicycle path to said sidewalk; since said sidewalk is clearly an unlawful obstruction to the free use of the path, the abutter's easement of access being a right which must be exercised so as to accomodate his property to the equal use of the street, which is under the exclusive control of the county commissioners; and a complaint to enjoin the commissioners from removing the obstruction is demurrable. *Miller v. Pierce County*..... 592

HOMESTEAD:

1. HOMESTEAD—EXEMPTION—ADMINISTRATOR'S APPLICATION TO SELL REAL ESTATE TO PAY DEBTS—SELECTION FROM HUSBAND'S SEPARATE PROPERTY—DESCENT OF HOMESTEAD—RIGHTS OF WIDOW. Where an administrator makes application to sell, for the purpose of paying the debts of the estate, the real estate occupied, but not selected, by the deceased as a homestead, alleging that the same was his separate property, and the widow attempts to select the same as a homestead after the death of the husband.

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and contests the application, the separate character of the property is in issue and should be determined, since the widow can not select a permanent homestead from the unselected separate estate of her husband to the exclusion of the other heirs, but the same descends to the heirs at law, under Bal. Code, §§ 5246, 6219 and 6222. *In re Lloyd's Estate*..... 84

2. SAME. While such matter is more properly determined upon the final distribution of the estate, the appellant's claim of a homestead in the premises makes it proper to determine the same upon the application to sell the real estate. *Id.*..... 84

3. SAME—VALUE OF HOMESTEAD—PRIOR EX PARTE APPRAISEMENT NOT RES ADJUDICATA. Upon an administrator's application to sell the deceased husband's real estate to pay the debts of the estate, contested by the widow, who selected and claimed the same as a homestead, a prior ex parte appraisement of the same at \$2,000, and an order setting the same aside as the homestead of the widow and minor child during the administration are not *res adjudicata* of the value thereof or of the question of the exemption of the same from the debts of the estate. *Id.*..... 84

4. SAME—SELECTION BY WIDOW—AMOUNT OF EXEMPTION—ORDER TO SELL REAL ESTATE TO PAY DEBTS WHERE VALUE OF HOMESTEAD IS \$3,000—CONTEST. Upon an application to sell all of the real estate of deceased to pay debts, which was separate property and which was occupied by him and is claimed by the widow as a homestead, it is proper to order the sale where the court finds upon ample testimony that it is of the value of \$3,000, since the selection and claim by the widow after the husband's death does not effect the exclusion of the creditors, regardless of the actual value, but the same descends to the heirs subject to the lawful rights of creditors and all parties interested, in the regular course of administration. *Id.*..... 84

HOMICIDE:

See CRIMINAL LAW, 7, 10-12, 17.

HUSBAND AND WIFE:

See COMMUNITY PROPERTY; DIVORCE.

— Personal injuries to wife. See PARTIES, 3.

1. HUSBAND AND WIFE—EJECTMENT—COMPLAINT—SUFFICIENCY—CONVEYANCE BETWEEN—PRESUMPTION OF GOOD FAITH UNTIL QUESTIONED. A complaint for the recovery of the possession of land, plaintiff's title to which is based upon a conveyance between a husband and wife, need not allege that such conveyance was

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made in good faith, under the statute casting the burden of proof upon the plaintiff, since such is the presumption until the good faith of the transaction is called in question and plaintiff need not anticipate such an issue, and since the pleading is to be liberally construed. *Malloy v. Benway* 315

2. DAMAGES—INJURIES TO HUSBAND—SERVICES OF WIFE AS NURSE—WHEN CANNOT BE INCLUDED. In an action by a husband and wife for personal injuries sustained by the husband, it is error to include in the recovery \$50 for the services of the wife as a nurse, where it appears that nothing was expended in that behalf and that the wife attended to her household duties at the same time, and there was no evidence of the value thereof; and a special finding therefor having been included in the verdict, the judgment should be reduced \$50 in amount. *Lawson v. Seattle & Renton R. Co.* 500

IMPROVEMENTS:

- On separate estate. See COMMUNITY PROPERTY, 3.
- Of vendee, void sale. See EXECUTORS AND ADMINISTRATORS, 4.

INCEST:

- See CRIMINAL LAW, 6.

INDEMNITY:

- Modification of contract. See PRINCIPAL AND AGENT, 3.

1. AGENTS—BOND ISSUED ON UNAUTHORIZED MODIFICATION OF CONTRACT—CONSIDERATION. Where a surety company requires a building contract to be modified and accepts such change by the architect who, from the contract, appeared to have no authority to make the alteration on behalf of the owner, and the company fails to notify the owner of the modification, it cannot claim that the bond was void as issued without consideration, after the owner paid out money on the contract on the faith of the bond. *Sweeney v. Aetna Indemnity Co.* 126
2. INDEMNITY—CONSIDERATION—BOND NOT REQUIRED BY THE CONTRACT. A contractor's bond guaranteeing the completion of a building contract, is not void as issued without consideration because the contract failed to require any bond or security, when the owner refused to execute the contract unless such bond was furnished. *Id.* 126

INFANTS:

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- Appointment of guardian. See GUARDIAN AND WARD, 1.
- Void sale. See EXECUTORS AND ADMINISTRATORS, 1-4.
- 1. **INFANCY—DISAFFIRMANCE OF DEED—DELAY OF THREE YEARS.** Where a minor does nothing for more than three years after attaining his majority to disaffirm a deed executed by him when he was nineteen, he fails to disaffirm the contract within a reasonable time, as required by Bal. Code, § 4581, and cannot claim that the deed is invalid because not ratified by him. *Johnston v. Gerry*..... 524
- 2. **INFANTS—ACTION FOR PERSONAL INJURIES—DAMAGES INCLUDING EXPENDITURES FOR MEDICAL ATTENDANCE—SUIT BY FATHER AS GUARDIAN EMANCIPATING MINOR.** In an action for personal injuries sustained by a minor it is not error to permit the recovery to include expenditures for medical attendance, objected to because the minor had no capacity to sue therefor, when the action was brought by the father as guardian *ad litem* for the minor, since thereby the father emancipates his son in respect thereto, and would be barred from recovering for the same in his own name. *Donald v. Ballard*..... 576

INFORMATION:

See CRIMINAL LAW, 1-8.

INJUNCTIONS:

- Enforcement, construction of order. See PROHIBITION, 1.
- Obstruction of navigation. See WATERS, 3.
- Restraining issue of warrants. See PARTIES, 4.

INSANITY:

- As defense. See EVIDENCE, 8; CRIMINAL LAW, 10, 17, 18.

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See CRIMINAL LAW, 17-21; DAMAGES, 1-2; MASTER AND SERVANT, 15, 19; CARRIERS, 1; MUNICIPAL CORPORATIONS, 13; TRIAL, 8-10, 20.

INSURANCE:

See BENEFICIAL ASSOCIATIONS.

- 1. **INSURANCE—VALIDITY—FRAUD—FALSE REPRESENTATIONS IN SECURING POLICY—INTENT.** A policy of fire insurance upon a house in the course of construction is void where the owner secured the same by falsely representing to the agent the value of the

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house when completed and that he had already paid \$1,500 on the contract price, when he had in fact paid less than \$700, and such statement peculiarly within his knowledge must be presumed to have been intentionally made and fraudulent. *Dunham v. Citizens' Insurance Co.*..... 206

2. SAME—REPRESENTATIONS OUTSIDE THE WRITTEN APPLICATION. Such false representations vitiate the policy although not included in the written application, when fraudulently made upon inquiry by the agent, where the policy provides that it shall be void if the insured has concealed or misrepresented "in writing or otherwise" any material fact. *Id.*..... 206
3. SAME—FALSE REPRESENTATIONS TO AGENT NOT COMMUNICATED TO THE COMPANY. False representations as to matters material to a risk, made to an agent who had power to and did issue the policy without sending the application to the company, vitiate the policy, although they were not communicated to the company, the information relied upon by the agent being under the circumstances information to the company. *Id.*..... 206
4. SAME—POSITION OF CREDITORS FOR WHOSE BENEFIT INSURANCE IS FRAUDULENTLY SECURED—DEFENSE OF FRAUD. Where the owner of a house secures insurance in his own name by fraudulent representations without disclosing that it was secured for the benefit of creditors who had furnished material for its construction, the creditors stand in no better position than the owner, and the defense of fraud is available to the company. *Id.*..... 206
5. SAME—COMPROMISE OF VOID POLICY—EQUITABLE ASSIGNMENT OF CLAIM—DEFENSE OF FRAUD. Where an insurance company compromises a loss under a void policy by paying the owner of the premises one-half the sum claimed, without notice to creditors of the owner who have given notice of an equitable assignment to them of the amount due on the policy, the company is not liable to such creditors, since nothing was due on the policy, and the invalidity of the policy could still be litigated by the company to defeat its recovery. *Id.*..... 206
6. INSURANCE—RECOVERY OF PREMIUM PAID UNDER FALSE REPRESENTATIONS — PLEADINGS AND PROOF — VARIANCE. In an action against an insurance company brought to recover the amount paid as a premium upon a life insurance policy, in which the complaint alleges that the same was obtained through the false and fraudulent representations of the defendant's agent, wherein the defendant agreed to issue a policy authorizing a certain loan after the payment of two annual premiums, it is not a variance to receive evidence that portions of a sample policy containing no such agreement were read to the plaintiff by the agent, who

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explained or construed a certain clause thereof to authorize the loan as represented. *Anderson v. New York Life Insurance Co.* 616

IRRIGATION:

1. IRRIGATION—WATERS—ACTION TO ENJOIN DIVERSION—PLEADING—PARTIES DEFENDANT—WHEN UNNECESSARY. In an action by a lower riparian owner on W creek to restrain the wrongful diversion of the upper waters therefrom into D creek, which naturally received part of the flow from W creek, an answer setting up that many riparian owners on D creek other than the defendants had been using the waters naturally flowing in D creek, and asking that they be made parties, does not raise a defect of parties defendant, where there is nothing to prevent the court from passing on the rights of the parties before it, and where the answer does not allege that such parties were using the waters adversely to plaintiff. *Sander v. Wilson* 659
2. SAME—DOCTRINE OF APPROPRIATION CONFINED TO PUBLIC LANDS—PRIOR RIGHTS NOT AFFECTED BY ACT OF 1873. The doctrine of the prior right to waters for irrigation by appropriation applies only to public lands, and the act of 1873, declaratory thereof, does not apply when the lands cease to be public, and has no application to riparian rights which had become fixed prior thereto. *Id.* 659
3. SAME—IMMATERIAL ISSUES—PRIORITY OF APPROPRIATION BY PARTIES DISCLAIMING ADVERSE INTEREST. In an action to enjoin the diversion of waters from W creek into D creek, where the whole controversy is over the question of whether any such diversion has been made, the priority of appropriation of the parties using the waters naturally flowing into D creek, and who disclaim any right to the waters naturally flowing in W creek, is not material. *Id.* 659
4. SAME—DECREE DETERMINING AMOUNT OF WATER TO WHICH PARTIES ARE ENTITLED—DEFINITENESS. A decree determining that the plaintiffs were entitled to 1,300 inches of water in W creek, measured under a four-inch pressure, according to the custom of miners, and giving the defendants a right to move for a modification of the decree if circumstances warranted it, to obtain any surplus that might thereafter exist, is sufficiently definite and certain. *Id.* 659

INTEREST:

- On award. See EMINENT DOMAIN, 1-3.
- On judgment on appeal, date. See APPEAL AND ERROR, 54.

INTOXICATION:

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- Of party injured. See CARRIERS, 1.
- Of witness. See CONTINUANCE, 1.

JUDGES:

1. JUDGE PRO TEMPORE—JUDGMENTS—VACATION—JURISDICTION TO HEAR MOTION TO VACATE JUDGMENT. Where a case is heard by a judge *pro tempore* appointed for the purpose, he has jurisdiction to hear and determine a motion to vacate and set it aside. *Fisher v. Puget Sound Brick etc. Co.*..... 578

JUDGMENT:

- Against city, warrant for. See MUNICIPAL CORPORATIONS, 7.
 - Against county, warrant for. See APPEAL AND ERROR, 19.
 - Assignee, not party. See APPEAL AND ERROR, 14.
 - Certainty. See IRRIGATION, 4. In tax case. See TAXATION, 17.
 - Deficiency. See APPEAL AND ERROR, 2; MORTGAGES, 1.
 - Interest on. See EMINENT DOMAIN, 1-3.
 - Nunc pro tunc order. See TAXATION, 19.
 - Tax cases, presumptions. See COURTS, 3.
 - Vacation of. See APPEAL AND ERROR, 1, 10, 12, 20; CERTIORARI, 2; COURTS, 1-3; DIVORCE, 2; JUDGES, 1; PROHIBITION, 2.
1. JUDGMENT—PROCESS—RECITAL OF DUE SERVICE—PRESUMPTION IN FAVOR OF. A judgment of the superior court reciting generally due service of process, raises the presumption of a valid service, although the only proof in the record shows a defective publication as to the nonresidents; and a resident defendant to avoid the judgment must show affirmatively that no personal service was made. *Ballard v. Way*..... 116
 2. JUDGMENT—VACATION—PRESUMPTION AS TO REGULARITY. A judgment entered after a trial in the absence of defendant, who alleges he had no notice of the trial, will be presumed regular where the record fails to show that he had no notice, since error must be affirmatively shown. *Sellers v. Pacific Wrecking etc. Co.* 111
 3. JUDGMENT—EVIDENCE OF—JOURNAL ENTRY CONTROLLED BY SIGNED ORDER. Where the clerk's brief entry on the minutes, entered on the day that the court orally announces its decision, is inconsistent with the formal order of the court signed and filed a few days later, the latter controls, and must be considered the evidence of the real and final act of the court on the subject *State ex rel Jensen v. Bell*..... 185

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4. JUDGMENTS — VACATION — NOTICE OF ENTRY UNNECESSARY — SUFFICIENCY OF SHOWING—DISCRETION IN REFUSING TO VACATE. It is not error to refuse to vacate a judgment made nine months after its entry, because of failure to serve notice thereof and of the findings of fact and conclusions of law, upon the affidavit of counsel that he had no notice of the judgment for a "long time" after its entry and would have perfected an appeal if he had had notice in time, where opposite counsel make affidavit that actual notice was given orally and by leaving a copy at the attorney's office, and that they conversed about the judgment two months after its entry, since it is unnecessary to give notice of the time and place of signing a judgment, and no abuse of discretion appears in refusing to vacate the judgment on the showing made. *Fisher v. Puget Sound Brick etc. Co.*..... 578
5. JUDGMENTS — VACATION — NUNC PRO TUNC ENTRY. An order vacating a judgment for inadvertence and want of jurisdiction cannot be regarded as a *nunc pro tunc* entry of a judgment, when it does not appear what judgment the court intended to make. *Aetna Insurance Co. v. Thompson*..... 610

JURY:

- Misconduct. See NEW TRIAL, 3, 12.
- Qualification, waiver. See CRIMINAL LAW, 14.
- Separation. See CRIMINAL LAW, 15, 16.

LANDLORD AND TENANT:

- Tenant's oral agreement to purchase. See FRAUDS, STATUTE OF.
 - Tenant holding over. See FORCIBLE ENTRY AND DETAINER, 1.
1. LANDLORD AND TENANT—EJECTMENT—LEASE NOT EXECUTED BY WIFE—ACCEPTANCE OF RENTS—RESCISSION OF LEASE—FINDINGS OF FACT—CONCLUSIONS OF LAW, WHEN SUPPORTED. In an action to recover possession of premises from a former tenant under a lease which was invalid because not joined in by the wife and another joint owner, in which the court finds at the request of the defendant that rent was received thereunder so that the wife and joint owner might be estopped by the acceptance of rent, a conclusion of law that the lease is invalid is supported by the further finding to the effect that the lease had been subsequently mutually rescinded, since such conclusion is not based wholly upon the non-execution of the lease. *Snyder v. Harding*, 286
 2. SAME—RESCISSION OF LEASE BY ACTION TO COMPEL CONVEYANCE—ACCEPTANCE OF RESCISSION BY SUIT TO RECOVER POSSESSION.

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Where a tenant in possession begins an action for specific performance of an alleged contract of sale to him, he rescinds the lease, and an action to recover possession by the landlord is an acceptance of such rescission, and the rescinded lease gives the tenant no standing in court. *Id.*..... 286

3. SAME—RESCISSION OF LEASE—WHEN WITHIN PLEADINGS. In an action to recover possession of premises in which the complaint alleges that defendant is in wrongful possession, claiming some interest in the land, and the answer sets up a lease, and the reply avers facts showing a mutual rescission of the lease, the feature of the rescission of the lease is within the issues properly presented by the pleadings. *Id.*..... 286
4. SAME—DEFENDANT NOT A TENANT—PLEADINGS—RESTITUTION. In such a case the action does not fail on the ground that it was prosecuted against defendant as a tenant, because a writ of restitution issued, where the complaint does not allege that defendant was a tenant, since Bal. Code, § 5500, authorizes such an action against one not a tenant. *Id.*..... 286
5. LANDLORD AND TENANT—NOTICE TO QUIT—SUFFICIENCY. A notice to quit is not objectionable as not signed by the owner, where it appears that the notice was prepared by a clerk of the authorized agents, who submitted it to the agents, and signed the agents' and owner's names by authority of the agents, since the material thing is the giving of the notice. *Bond v. Chapman*, 606

LAW OF CASE:

See APPEAL AND ERROR, 52, 53; PLEADINGS, 7; SEAMEN, 1.

LEASE:

See LANDLORD AND TENANT.

— Assignment of. See ASSIGNMENT, 1.

LICENSE:

— Fees due state. See LIMITATION OF ACTIONS, 1-3.

— To cut timber. See SALES, 3.

LIENS:

See MECHANICS' LIENS; TAXATION.

— Of Agent, for advances. See PRINCIPAL AND AGENT, 7.

— For purchase money and taxes. See EXECUTORS AND ADMINISTRATORS, 4.

LIMITATION OF ACTIONS:

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— Action to recover void tax. See **TAXATION**, 14.

1. **STATUTE OF LIMITATIONS—VESTED RIGHTS—RETROACTIVE EFFECT OF AMENDMENT—ACTION BY STATE—CLAIM AGAINST MUNICIPAL CORPORATIONS—MORAL OBLIGATIONS.** It was competent for the legislature by Laws 1903, p. 26, to amend the statute of limitations (Bal. Code, § 4807) by providing that it shall never be pleaded to an action brought by or for the benefit of the state, in so far as the same affects moral claims against municipal corporations, although the statute had fully run prior to the amendment of the law, since a city is a subordinate subdivision of the state government and may be obligated to pay claims not strictly binding in law, if just and equitable in their character. *State v. Aberdeen*, 61
2. **SAME.** Query as to whether such amendment could be made retroactive in so far as it affects contractual obligations which involve private individuals. *Id.*..... 61
3. **SAME—LICENCE FEES DUE FROM CITY TO STATE.** The claim of the state against a city for a percentage of the liquor license fees collected by the city as an incident to its police powers, and due under the law to the state, is a well grounded moral or equitable obligation although barred by the statute of limitations, and the bar may be removed by the legislature without violating vested rights or the constitutional prohibition against the taking of property without due process of law. *Id.*..... 61
4. **LIMITATION OF ACTIONS—COVENANT TO PAY TAXES—ACTION ACCRUES WHEN TAXES BECOME DUE.** Where the defendant having agreed to purchase land of the plaintiff within two years, covenanted to pay all taxes that might be levied upon the property during said two years, and defaulted, and the plaintiff subsequently paid said taxes, the right of action upon the covenant to pay the taxes accrued when said taxes became due, and the right of action is barred after the lapse of six years; since the contract is not simply one of indemnity and is not postponed until the plaintiff has paid the same. *Litchfield v. Cowley*..... 566
5. **STATUTE OF LIMITATIONS—CLAIM AGAINST DECEDENTS—ACTION UPON NOTE AND MORTGAGE—DEATH OF MAKER—PRESENTATION OF CLAIM AGAINST ESTATE—RIGHT OF ACTION ON NOTE SUSPENDED BY DEATH.** Where the maker of a note secured by mortgage dies before the statute of limitations has run, the holder, upon presenting the claim to the administrator within the year limited to creditors, is entitled to have the same allowed against the estate, and such presentation will prevent the running of the statute of limitations against the note. *Frew v. Clark*..... 561
6. **SAME—RIGHT OF ACTION ON MORTGAGE—BARRED AFTER SIX YEARS FROM MATURITY—NOT SUSPENDED BY DEATH OF MAKER.**

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But in such case the right of action upon the mortgage is barred after the lapse of six years after the maturity of the note, since the death of the maker did not suspend the right of action on the mortgage, and upon the allowance of the claim against the estate, the holder is not entitled to any preferential rights in the mortgaged property. *Id.*..... 561

LOGS AND LOGGING:

— Booming logs, navigation. See **WATERS**, 1-3.

MALICIOUS PROSECUTION:

1. **MALICIOUS PROSECUTION—CIVIL ACTION WITHOUT ARREST OR SEIZURE OF PROPERTY.** An action for the malicious prosecution of a civil suit without probable cause will not lie when there was no arrest of the person or seizure of property therein, and no special injury sustained which would not necessarily result in all like prosecutions. *Abbott v. Thorne*..... 631

MANDAMUS:

— Proceedings conforming to. See **EXEMPTIONS**, 2.

MARITIME CONTRACT:

— For medical attendance. See **SEAMEN**, 1.

MASTER AND SERVANT:

- Excessive damages. See **DAMAGES**, 4.
 - Instructions as to contributory negligence. See **TRIAL**, 11.
 - Rules of company, harmless error. See **APPEAL AND ERROR**, 48.
1. **MASTER AND SERVANT—PARTIES—JOINDER IN ACTION FOR NEGLIGENCE OF SERVANT.** An action for tortious negligence may be maintained jointly against a railroad company and the conductor of its train for injuries resulting from the negligent act of the conductor. *Morrison v. Northern Pac. R. Co.*..... 70
 2. **MASTER AND SERVANT—SAFE PLACE—FALL OF TEMPORARY STAGING—CONSTRUCTION BY FELLOW-SERVANTS—SERVANTS EMPLOYED TO PREPARE PLACE.** A carpenter cannot recover for personal injuries caused by the breaking of a defective plank used in the construction of a temporary staging erected by a fellow-carpenter, without any supervision by the employer or his foreman, where the carpenters at work on the building, including the plaintiff, were employed, and it was customary for them, to erect their own staging, and the employer furnished suitable material for the

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purpose, and provided competent co-servants, who failed to discover the defect in the plank on inspection, and no one had any notice thereof, since the negligence, if any, was that of a fellow-servant, and the rule as to the master's liability to furnish a safe place does not apply where the preparation of the place is itself a part of the work which the servants were employed to perform. *Metzler v. McKensie* 470

3. SAME. An order from the foreman to a fellow-carpenter to construct such staging does not constitute him a vice-principal while constructing the same. *Id.*..... 470

4. MASTER AND SERVANT—NEGLIGENCE—SAFE PLACE—PUSHING CAR OF LUMBER—INJURY TO SERVANT CAUGHT BETWEEN CARS—CONTRIBUTORY NEGLIGENCE AND ASSUMPTION OF RISKS—EVIDENCE—QUESTION FOR JURY. It is for the jury to pass upon questions of negligence, contributory negligence and assumption of risks, where the plaintiff was injured between two cars of lumber by reason of projecting sticks while assisting to push a car from the defendant's dry kiln, when it appears that the kiln was dark and it was difficult to see until after being inside some time, that the men were required to work rapidly on account of the excessive heat, and to look carefully where they stepped, that the sticks were longer than usual and not uniformly piled, and the plaintiff had not assisted in piling the lumber and would not have been injured if care had been exercised in piling the same, and the piling was done under the direction of defendant's foreman. *Gaudie v. Northern Lumber Co.*..... 34

5. SAME—PILING LUMBER—FOREMAN A VICE-PRINCIPAL. In such a case, no question of fellow servants is involved, as the foreman under whose direction the lumber is piled is a vice-principal, charged with the master's duty in respect thereto. *Id.*..... 34

6. SAME—WARNING—EVIDENCE IN REBUTTAL—CONTRADICTING CROSS-EXAMINATION OF PARTY'S OWN WITNESS. In an action for personal injuries, where the cross-examination of plaintiff's witness leaves the impression that plaintiff had been warned of the danger, it is proper to permit the plaintiff to testify in rebuttal that he had received no warning. *Id.*..... 34

7. MASTER AND SERVANT—NEGLIGENCE—DANGERS FROM VIBRATION OF SAW—DUTY TO WARN INEXPERIENCED EMPLOYEE. A master who employs a wholly inexperienced man to work in a shingle mill, and to remove slabs lodged near a saw, owes a greater duty to warn him of the danger of striking the saw and causing it to vibrate than would be the case if the servant were experienced. *Jancko v. West Coast Mfg. & Inv. Co.*..... 556

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8. SAME—ASSUMPTION OF RISK. It cannot be said as a matter of law that a wholly inexperienced servant assumes the risks from the vibration of a saw, when he testifies that he did not know it would vibrate and one expert testified that there was nothing to indicate that it would. *Id.*..... 556
9. SAME—INJURY TO INEXPERIENCED SERVANT IN REMOVING SLABS FROM SAW—DEFECTIVE APPLIANCES—LIGHT—FAILURE TO WARN—CONTRIBUTORY NEGLIGENCE—KNOWLEDGE OF VIBRATION OF SAW—EVIDENCE—SUFFICIENCY—QUESTION FOR JURY. It is a question for the jury as to whether the master was negligent in failing to give warning of the dangers, and in failing to provide sufficient light, whether the appliances were defective and whether the plaintiff was guilty of contributory negligence, where it appears that he was set to work upon a knee-bolter and instructed to remove slabs that became lodged near the saw by inserting his hand into a six inch space beside the saw and through an opening twenty inches wide, that the space to be safe should have been thirty-six inches wide, that striking the saw with a slab in removing it would cause the saw to vibrate from side to side three or four inches, and three of plaintiff's fingers were cut off by such vibration of the saw in an attempt to remove a slab in the manner that had been illustrated to him by the operator, whose directions the foreman had instructed him to follow, that the place was dark and an electric light over the saw was not lighted, and that the plaintiff did not know that the saw would vibrate, and was wholly without experience, to the defendant's knowledge, and received no warning of any dangers in the operation. *Id.*..... 556
10. SAME—SERVANT OBEYING ORDERS. Where a servant obeys orders to do a certain work, he has the right to rely upon the superior knowledge and skill of the master and to assume that he will not be exposed to unnecessary dangers. *Id.*..... 556
11. MASTER AND SERVANT—NEGLIGENCE—CUSTOM TO GUARD MACHINE—ADMISSIBILITY UNDER GENERAL ALLEGATION. Proof of a general custom to place guards upon ripaws is admissible under a general allegation of negligence in failing to provide a guard, after a promise so to do. *Crooker v. Pacific Lounge & Matress Co.* 191
12. SAME—PROOF OF GENERAL CUSTOM TO ESTABLISH NEGLIGENCE. Proof of a general custom to guard a ripaw is admissible as tending to show whether appellant exercised reasonable care. *Id.* 191
13. SAME—EVIDENCE IN REBUTTAL—CUSTOM TO CONTRADICT DEFENDANT'S EXPERTS. Where a plaintiff's expert witnesses had testified that spreaders were necessary adjuncts to hand-fed ripaws,

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and defendant's experts testified that they were antiquated devices and were being generally discarded, it is not error to permit testimony in rebuttal to the effect that, upon examination of the mills and factories at the place in question, spreaders were found to be generally used. *Id.*..... 191

14. MASTER AND SERVANT—OPERATION OF RIPSAW—CUSTOMARY MANNER—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. In an action for personal injuries received while operating a rip saw, when it appears that the plaintiff was operating the machine in the customary manner, the question of his contributory negligence, in failing to remove a sliver so that it would not be caught by the saw, is for the jury. *Id.*..... 191

15. SAME—PROMISE TO REPAIR DEFECT—ASSUMPTION OF RISKS AFTER PROMISE—INSTRUCTIONS. Instructions that an operator of a machine does not assume the risk of a defect after a promise to repair, and as to his duty in the premises, approved. *Id.*..... 191

16. MASTER AND SERVANT—NEGLIGENCE—COAL MINE IN POSSESSION OF DEVELOPMENT COMPANY—CONTROL BY OWNER. In an action against a coal company for personal injuries sustained by a miner, a challenge to the sufficiency of the evidence, on the theory that the mine was not in the possession of the company at the time of the accident, but in the possession of the construction company, which had been doing development work, is properly overruled, where in addition to the coal company's ownership other circumstances appear connecting it in a responsible way with the control and operation of the mine. *Currans v. Seattle & San F. R. & Nav. Co.*..... 512

17. SAME—INJURY TO MINER BY DELAYED BLAST—USE OF DEFECTIVE FUSE—EVIDENCE OF NEGLIGENCE—SUFFICIENCY—QUESTION FOR JURY. In an action for injuries sustained by a delayed blast, it is a question for the jury whether defendant was guilty of negligence in supplying the workmen with double-tape fuse for use in blasting in a coal mine, where it appears that triple tape fuse is firmer, less liable to miss fire or to hold the fire in delay, and is more often used in coal mines and in damp places than the double-tape, which was considered not safe in such places, and where the blast was delayed some forty-five minutes, which was longer than usual. *Id.*..... 512

18. SAME—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISKS—EXPERIENCED MINER INJURED IN INVESTIGATING DELAYED BLAST. In such a case the question of the contributory negligence and assumed risk by an experienced miner injured while investigating the cause of a delayed blast is for the jury, where he had been working but a short time in the mine, was unfamiliar with

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double-tape fuse and did not know that it was unsafe or more likely to hold fire or delay the blast than triple-tape fuse, although he was a miner of twenty-three years' experience, and had heard that fuses held fire for hours, and when it was a rule for an explosion to occur or for the fire to be extinguished before the lapse of time for which he waited for it, and he testified that in mines where he had worked fuses were not used; since he does not assume an increased hazard out of the ordinary which he did not appreciate, and contributory negligence is a defense, the burden of establishing which is upon the defendant.

Id 512

19. RAILROADS—NEGLIGENCE IN PASSING OF TRAINS—FELLOW SERVANTS—ENGINEER OR CONDUCTOR IN CHARGE OF THE MOVEMENT—INSTRUCTIONS. When a number of freight trains had orders to pass at a certain siding which was not long enough to hold the trains going in either direction, necessitating as claimed, that they "saw by," and a brakeman on an eastbound train is injured in a collision caused by the alleged negligence of the conductor on a westbound train in attempting such operation by running his train past the switch before the arrival of the second eastbound train; and it is claimed by the defendants that the engineer on the westbound train was responsible, instead of the conductor, in that he had control of the train, held:

(1) That an instruction that said westbound engineer was a fellow servant of plaintiff is properly refused on the theory that, if he was responsible in having the control of the operation of the trains in passing, he was a vice-principal.

(2) That the defendants' view of the law relative to the responsibilities of said engineer was given in any event by an instruction to the effect that the plaintiff could not recover in case said engineer had the right to direct the movement of the train and the collision was due to his negligence.

(3) That an instruction to the effect that the plaintiff could not recover if a flagman was sent out and the collision was due to the negligence of the eastbound engineer in failing to stop his train after being flagged, because there was no allegation of negligence on the part of the eastbound train crew, is favorable to the defendants and presents the case within the limitations established by the complaint. *Morrison v. Northern Pac. R. Co.* 70

20. TRIAL—VERDICT—CONTRIBUTORY NEGLIGENCE—GENERAL VERDICT WHEN NOT INCONSISTENT WITH SPECIAL FINDING. A general verdict for plaintiff finding that he was not guilty of contributory negligence in pushing upon a car from the side, is not inconsistent with a special finding that he could have avoided the

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danger by going in front of or behind the car, since the special verdict did not find that the danger in working at the side was known or obvious. *Gaudie v. Northern Lumber Co.*..... 34

MECHANICS' LIENS:

1. MECHANICS' LIENS—FORECLOSURE—COMPLAINT—CONTRACT ABANDONED BY ONE OF THREE CONTRACTORS—PERFORMANCE BY OTHERS ACCEPTED. A complaint for the foreclosure of a mechanics' lien is not demurrable because it appears that one of the three original contractors withdrew from the contract before the work was commenced, where it is alleged that the other two contractors undertook the work and that plaintiff made partial payments to them as the work progressed, and accepted part of the buildings when completed. *Cochran v. Yoho* 238
2. SAME—OWNER STOPPING WORK BY EJECTING CONTRACTORS—DAMAGES—EVIDENCE—SUFFICIENCY—FINDINGS WHEN NOT DISTURBED. A finding that the owner of premises forcibly ejected the contractors is sustained by evidence that he locked them out and informed them that one of the contractors would not be allowed to do any more work, because he was dissatisfied with the same, although afterwards the owner gave them written notice to proceed with the work, and the finding that the owner was not justified in stopping the work will not be disturbed on conflicting evidence where the trial court had an opportunity to observe the witnesses. *Id.*..... 238
3. SAME—NOTICE TO CONTINUE WORK AFTER RESCISSION OF CONTRACT. By wrongfully stopping the work the owner became liable to the contractors, and after treating the contract as rescinded they were not required to go back to work by receipt of the written notice. *Id.*..... 238
4. SAME—EVIDENCE OF DAMAGES TO CONTRACTORS—AMOUNT. Upon examination of the testimony an allowance for damages to the contractors is reduced by certain credits to which the owner appears entitled, ordering judgment for \$413.38 instead of \$482.10. *Id.* 238

MINES:

— Delayed blast. See MASTER AND SERVANT, 17, 18.

MISTAKE:

- Description of land. See VENDOR AND PURCHASER, 5.
- Mutual. See COMPROMISE, 3-5.
- Of taxing officers. See TAXATION, 9.

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- Allegation of value. See CRIMINAL LAW, 5.

MORTGAGES:

- Deed as. See FRAUDS, STATUTE OF, 2-5.
- Deficiency judgment. See APPEAL AND ERROR, 2
- Foreclosure. See LIMITATION OF ACTIONS, 6.
- Foreclosure, foreign law requiring. See APPEAL AND ERROR, 53.
- Fraud of creditors. See TRUSTS, 1.

1. **MORTGAGES—FORECLOSURE—PLEADING—PRAYER OF COMPLAINT—JUDGMENT FOR DEFICIENCY.** A deficiency judgment upon a mortgage foreclosure is authorized by a prayer in the complaint for judgment generally, for a foreclosure decree and sale, and further proper relief (*Rogers v. Turner*, 19 Wash. 399, followed). *State ex rel. Twigg v. Superior Court*. 643

MUNICIPAL CORPORATIONS:

- Action against, moral claim. See LIMITATION OF ACTIONS, 1-3.
- Assessments for local improvements, priority. See TAXATION, 1.
- Incorporation, parties. See QUO WARRANTO, 1.
- Interest on award. See EMINENT DOMAIN, 1-3.
- Ordinances, passage, validity. See TAXATION, 11, 14.
- Streets, negligence. See DAMAGES, 3.

1. **MUNICIPAL CORPORATIONS—ORDINANCES—PASSAGE—PRIMA FACIE PROOF—CERTIFIED COPY OF RECORD.** Under Bal. Code, § 1299, a certified copy of the record of an ordinance is prima facie proof of its due passage, establishing the existence of the ordinance until the presumption is overcome. *Gove v. Tacoma*. 434
2. **SAME—RECORD BOOK—ORIGINAL SIGNATURES OF OFFICERS.** Where a city charter requires a record book of ordinances to be signed by certain officers, the same with the original signatures of such officers is valuable and weighty evidence in support of the statutory prima facie proof by a certified copy of the record and is not overcome by evidence of a mere negative character. *Id.*. 434
3. **SAME—JOURNAL ENTRIES—IDENTIFICATION OF ORDINANCE BY REFERENCE TO SUBJECT MATTER.** The journal entries need not refer to an ordinance by number, and they sufficiently identify the ordinance by reference to its subject matter, when no other ordinances were introduced upon the same subject. *Id.*. 434
4. **SAME—JOURNAL ENTRY AS TO PASSAGE.** A journal entry to the effect that an ordinance "was passed by council" is not insuffi-

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- cient as a legal conclusion, but is in reality a statement of a fact when there is no other evidence of its due passage. *Id.*..... 434
5. SAME—ORAL EVIDENCE OF VOTE WHERE JOURNAL IS SILENT. When the journal entry states that an ordinance "was passed by council" without stating what the vote was, it is competent to show by the oral testimony of a member of the council who was present that the ordinance was passed by a vote of twelve for and four against it, upon the theory that evidence *altunde* the record is admissible where no record was made. *Id.*..... 434
6. MUNICIPAL CORPORATIONS—STREETS—EJECTMENT—COMPLAINT—OWNERSHIP OF STREET. A city may maintain an action of ejectment to recover possession of a portion of a public street, under the statute giving it the control thereof, and the complaint is sufficient without any allegation of ownership where it is alleged that it is a public street. *Port Townsend v. Lewis*..... 413
7. EMINENT DOMAIN — MUNICIPAL CORPORATIONS — JUDGMENT AGAINST CITY ON AWARD—WARRANTS IN SATISFACTION OF JUDGMENT—FUND PROVIDED BY LOCAL ASSESSMENTS NOT ALL COLLECTED—TAKING POSSESSION BY CITY. After a city has condemned land the owners, upon satisfying the judgment received by them for its value, and presenting a transcript thereof pursuant to Bal. Code, § 5676, are entitled to a warrant against the fund provided for the redemption of such warrants, and the city is not excused from issuing such warrant by the fact that the fund therefor is not all collected, and that the city has not yet taken possession of the land. *State ex rel. Donofrio v. Humes*..... 347
8. MUNICIPAL CORPORATIONS — ASSESSMENTS FOR LOCAL IMPROVEMENTS—RESTRICTION TO FIFTY PER CENT OF ASSESSED VALUE—CONSTRUCTION OF CHARTER PROVISIONS. The provision in the city charter and ordinances of Tacoma, p. 77, § 137, that no local improvement shall be made when the estimated cost thereof shall exceed fifty per cent of the assessed value of the property to be assessed, refers to the total assessed value of the property in the district as assessed for general taxation, and does not invalidate an assessment against particular lots because in excess of fifty per cent of the assessed valuation of such lots; since there is no preliminary provision for an appraisal of values, and the other provisions of the charter show that the estimated cost and the assessed value referred to are known and considered before the amount charged against any particular lot could be ascertained; and since the charge for local improvements is not based on said assessed value, but upon the accruing benefits to the particular lots. *Ferry v. Tacoma*..... 652

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9. **SAME—ESTOPPEL OF PROPERTY OWNERS—OBJECTIONS TO BE MADE BEFORE CITY COUNCIL.** Where property owners fail after notice to appear before the city council and object to local assessments, they are estopped to question the regularity of the assessment, if the total cost of the improvement was within the fifty per cent value of all the property to be assessed. *Id.*..... 652
10. **MUNICIPAL CORPORATIONS—ACTIONS—DEMAND—PLEADINGS—CLAIM FILED INCONSISTENT WITH COMPLAINT.** In an action against a city for personal injuries sustained by a pedestrian by a collision with bicycles while plaintiff was walking on a bicycle path, which he was led to believe was a sidewalk, at a place where the city had negligently, as it is alleged in the complaint, failed to provide a sidewalk or any other walk for pedestrians or to give any notice of the nature and use of the path, an objection to any evidence is properly sustained where it appears that the claim required by law to be filed with the city alleged that the plaintiff was run into by bicyclists while walking upon one of the sidewalks of the city, since the same does not state any ground for a recovery and is inconsistent with the complaint, which presents altogether another cause of action. *McCarroll v. Spokane*, 34
11. **MUNICIPAL CORPORATIONS—STREETS—NEGLIGENCE—UNCORROBORATED EVIDENCE—SUFFICIENCY.** In an action for personal injuries sustained in a fall upon a defective walk, the uncorroborated testimony of the plaintiff as to the condition of the walk is sufficient to make a prima facie case for the jury, and the credibility thereof is exclusively for the jury. *Benson v. Town of Hamilton* 201
12. **SAME—PLAINTIFF'S KNOWLEDGE OF DEFECT—CONTRIBUTORY NEGLIGENCE—WHEN FOR JURY.** The statement of plaintiff, injured by a fall on a defective walk, that the walk was old, that she had been over it many times and had seen defects in it, is competent but not conclusive evidence of contributory negligence, making it a question for the jury. *Id.*..... 201
13. **MUNICIPAL CORPORATIONS—STREETS—NEGLIGENCE—PRESUMPTION AS TO SAFETY OF WALKS.** It is proper to instruct that one using a sidewalk of a city with due care may act on the presumption that it is reasonably safe throughout its entire width. *Gallamore v. Olympia* 379
14. **SAME—EVIDENCE—SUFFICIENCY—QUESTION FOR JURY.** Testimony of the plaintiff and other witnesses that she fell into an existing hole in the sidewalk is sufficient to make a case for the jury, even if it is contradicted. *Id.*..... 379

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15. SAME—CONSTRUCTIVE NOTICE OF DEFECT. Evidence that a hole in the sidewalk had existed for over a year is sufficient to show constructive notice on the part of the city. *Id.*..... 379
16. SAME—CONTRIBUTORY NEGLIGENCE OF PEDESTRIAN—PLAINTIFF'S NOTICE OF DEFECT IN SIDEWALK. Where the plaintiff state positively that she did not know of a defect consisting of a hole in the sidewalk over which she had passed prior to the injury, her contributory negligence in using the walk is a question for the jury. *Id.* 379
17. MUNICIPAL CORPORATIONS—STREETS—NEGLIGENCE—COMPLAINT—CHARACTER OF PLACE. A complaint for personal injuries sustained through a defect in a sidewalk which alleges that the same was "constructed, maintained and supervised" by the city in a certain street is sufficient against demurrer whether the sidewalk was in a public street or not; also, because the presumption that all streets are public streets could only be overcome by answer. *Id.* 379
18. SAME—LOCATION OF SIDEWALK IN STREET. An allegation that the sidewalk was on the "north side" of a certain street and that the street was in the city sufficiently shows that the sidewalk was within the city limits. *Id.*..... 379
19. SAME—PROOFS ADMITTED WITHOUT OBJECTION. Where proofs admitted without objection showed the sidewalk to be within the city limits, failure to allege the facts is not fatal. *Id.*..... 379
20. SAME—CONSTRUCTIVE NOTICE OF DEFECT. In an action for personal injuries through defects in a sidewalk, it is a sufficient allegation of the city's notice of the defect to allege facts from which notice to the city could be inferred. *Id.*..... 379
21. SAME—DEMAND BEFORE SUIT—CLAIM FOR PERSONAL INJURIES. The general statute requiring demands against a city to be filed before suit does not apply to claims for damages for personal injuries. *Id.* 379

MURDER:

See CRIMINAL LAW, 7, 9-12, 17-20.

NAVIGABLE WATERS:

See WATERS, 1-3.

NEGLIGENCE:

See MASTER AND SERVANT.

— Collision with street car. See NEW TRIAL, 4; PARTIES, 3; WITNESSES, 1.

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- Damages for. See DAMAGES, 1-4.
 - Death, right of action. See DEATH, 1.
 - Decision on former appeal. See APPEAL AND ERROR, 52.
 - Infants, capacity to sue for. See INFANTS, 2.
 - Sidewalks. See MUNICIPAL CORPORATIONS, 10-21.
 - Special findings. See MASTER AND SERVANT, 20; TRIAL, 6.
 - Street car. See CARRIERS, 1.
 - Vessel. See SEAMEN, 1.
1. NEGLIGENCE—DANGEROUS PREMISES—TRAP DOOR—NOTICE—EVIDENCE OF WARNING GIVEN TO OTHERS. In an action for personal injuries caused by falling through a trap door, maintained by the proprietor of a restaurant in dangerous proximity to the place provided for customers' hats and coats, evidence that on a previous occasion defendant had warned another customer about approaching the hole is admissible as descriptive of the place and to show defendant's actual knowledge of the danger. *Franklin v. Engel* 489
 2. NEGLIGENCE—COMPARATIVE—INSTRUCTION ENDORSING DOCTRINE OF. An instruction that the plaintiff in order to recover need not be wholly free from negligence, provided his negligence is slight in comparison with gross negligence of the defendant, is erroneous as an endorsement of the doctrine of comparative negligence. *Id* 490

NEGOTIABLE INSTRUMENTS:

- Defenses under foreign law. See APPEAL AND ERROR, 53.
- Presenting claim on. See LIMITATION OF ACTIONS, 5.

NEW TRIAL:

- Necessity of motion. See APPEAL AND ERROR, 7, 8.
 - New cause of action. See PLEADINGS, 1.
 - Not ordered if action does not lie. See APPEAL AND ERROR, 38.
1. NEW TRIAL—QUESTIONS OF LAW ONLY—REVIEWED REGARDLESS OF DISCRETION OF TRIAL COURT—SALES—OPTION—PAYMENT. In an action to recover commissions for effecting a sale of mining property, where it appears at the trial that only an option had been secured and no sale made thereunder, and a nonsuit is granted, the subsequent granting of a new trial upon the sole ground that the sale had been effected by payment in full since the trial, raises only a question of law, and the ruling is subject to review on appeal without reference to the trial court's discretion. *Lawrence v. Pederson* 1

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2. NEW TRIAL—INSUFFICIENCY OF THE EVIDENCE—DISCRETION OF LOWER COURT. Insufficiency of the evidence to sustain the verdict is ground for a new trial although there was some evidence to sustain the verdict, and the granting of a new trial upon conflicting evidence will not be disturbed except for abuse of discretion. *Welever v Advance Shingle Co.*..... 331
3. JURY—MISCONDUCT—NEW TRIAL—IMPROPER REMARK NOT INFLUENCING THE VERDICT. The fact that a juror stated in the jury room that the defendant had been tried several times on similar charges is not ground for a new trial on account of the improper conduct of a juror, where it does not appear that the remark had any influence upon the verdict. *State v. Druzinman*..... 257
4. NEW TRIAL—NEWLY DISCOVERED EVIDENCE—CUMULATIVE TESTIMONY. It is not error to refuse a new trial for newly discovered evidence where it is merely cumulative and although it is cumulative only of the testimony of the party to the action. *O'Toole v. Faulkner* 371
5. NEW TRIAL—NEWLY DISCOVERED EVIDENCE—CUMULATIVE TESTIMONY. It is not error to refuse a new trial on account of newly discovered evidence as to statements made by the plaintiff that she was not injured in the manner claimed, when it was only cumulative, other witnesses having testified to similar statements made to them, and this being one of the main points in the case. *Benson v. Town of Hamilton*..... 201

NONRESIDENTS:

- Notice to. See TAXATION, 21.
- Service upon. See JUDGMENT, 1; PROCESS.

NOTICE:

- Of appeal. See APPEAL AND ERROR, 13-16.
- Of award. See AWARD AND ARBITRATION, 3.
- Of assessment. See TAXATION, 20.
- Of defect in street. See MUNICIPAL CORPORATIONS, 12, 15, 16, 20.
- Of judgment. See JUDGMENTS, 4.
- Of receipt of tax books. See TAXATION, 21.
- Of statement of facts. See APPEAL AND ERROR, 28, 29.
- Of trial. See JUDGMENTS, 2.
- Of void tax sale. See TAXATION, 14.
- To quit. See LANDLORD AND TENANT, 5.

NOVATION:

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1. **NOVATION — SUBSTITUTION NECESSARY — SALE OF PERISHABLE GOODS WITHOUT WAIVER OF RIGHTS.** Where perishable merchandise shipped to the dealer was rejected on account of quality, and the seller refused to accept a return of the goods, an agreement, pending the settlement, that the same might be sold at the best price obtainable, without waiving the rights of either party, is not a novation, since there is no substitution of one obligation for another. *Tilden v. Gordon & Co.* 92

NUISANCE:

- Obstruction by abutting owner. See **HIGHWAYS**, 1.
- Obstruction to navigation. See **WATERS**, 3.

OFFICERS:

- Corporations, stock in. See **CORPORATIONS**, 5, 6.
- County auditor. See **APPEAL AND ERROR**, 19.

OPTION:

- See **NEW TRIAL**, 1; **BROKERS**, 1, 2.

ORDINANCES:

- See **MUNICIPAL CORPORATIONS**, 1-5.

OYSTER LANDS:

- See **PUBLIC LANDS**, 2.

PARTIES:

- See **APPEAL AND ERROR**, 9-14.
 - Capacity to sue. See **INFANTS**, 2.
 - City. See **QUO WARRANTO**, 1.
 - Defect of defendants. See **IRRIGATION**, 1.
 - Employee not notified to defend. See **WITNESSES**, 1.
 - Joinder. See **MASTER AND SERVANT**, 1.
 - Nonconsenting plaintiffs. See **EJECTMENT**, 1.
1. **PARTIES—ACTION TO QUIET TITLE TO TIMBER SOLD—VENDOR WHEN PROPER PARTY.** Where a party sells all the timber upon a tract of land, and subsequently makes another bill of sale of all the cedar timber on the same land, he is a proper party defendant to an action by his first grantees, brought to quiet title to the timber, in which it is alleged that he claims an interest therein, since his second bill of sale was an interference with plaintiff's rights. *Larson v. Allen* 113

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2. **EJECTMENT—JOINT OWNERS—PARTIES PLAINTIFF—UNITY OF TITLE.** In an action for the recovery of premises, part of which is owned by a husband and wife jointly with a third person, all the owners are proper parties plaintiff, although they do not own the premises by unity of title, where the action arises out of a common cause against the same party, since all having an interest may unite in a single suit. *Snyder v. Harding*..... 286
3. **HUSBAND AND WIFE—PARTIES—ACTION FOR PERSONAL INJURIES—ESTATE OF DECEASED HUSBAND—INTEREST IN SPECIAL DAMAGES.** In an action for personal injuries of a permanent and continuing character sustained by a married woman, the estate of the husband, upon his death before suit, may be joined as a party plaintiff where the community appears to be interested in special damages for medical attendance and other disbursements. *O'Toole v. Faulkner* 371
4. **PARTIES—ACTION BY TAXPAYER TO RESTRAIN PAYMENT OF WARRANTS—HOLDERS OF WARRANTS NOT JOINED—WAIVER BY FAILING TO RAISE POINT BY ANSWER OR DEMURRER.** In an action brought by a taxpayer against the officers of a school district and a contractor to restrain the payment of the warrants issued in payment of the contract price of a school building, in which the complaint alleges and the answer admits that the warrants were issued to the contractor, a defect of parties by reason of the fact that the contractor had sold the warrants before the action was commenced is waived by failing to raise the point by demurrer or answer, under Bal. Code, §§ 4907, 4909. *Criswell v. Directors School Dist. No. 24*..... 420

PARTITION:

1. **PARTITION—CONDEMNATION AWARD PAID TO CO-TENANT IN POSSESSION—TRUSTEE FOR CO-TENANTS.** Where condemnation proceedings for a right of way are prosecuted against a co-tenant in possession, the public record showing that she was the owner of the land, and a sum is awarded and paid to her as the value of the land taken, when in fact she had inherited but a one-half interest therein, in an action subsequently brought for a partition, she should be held to account as a trustee to the other heirs who were not parties to the condemnation proceedings, whether they were concluded thereby or not, since they may treat it as valid. *Legg v. Legg*..... 132
2. **SAME—DEFAULT OF HEIR.** An heir who was made a party to the condemnation proceedings and suffered a default therein is not entitled to share in the proceeds of such award. *Id.*..... 132

PARTNERSHIP:

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- Between husband and wife. See **COMMUNITY PROPERTY**, 8.

PAYMENT:

- Application of dues. See **BENEFICIAL ASSOCIATIONS**, 1, 2.
- Of creditors, on sale in bulk. See **SALES**, 1.
- Of less sum than total. See **COMPROMISE**, 2.
- Voluntary. See **TAXATION**, 3.
- When due, construction. See **CONTRACTS**, 1.

PLAT:

- Competency. See **EVIDENCE**, 3.

PLEADINGS:

- Answer, fraud, sufficiency. See **VENDOR AND PURCHASER**, 3, 4.
- Complaints, sufficiency of. See **CONTRACTS**, 1; **EJECTMENT**, 3; **ESTOPPEL**, 1; **MECHANICS' LIENS**, 1; **MORTGAGES**, 1; **MUNICIPAL CORPORATIONS**, 17-19; **PRINCIPAL AND AGENT**, 11; **SPECIFIC PERFORMANCE**, 1; **TAXATION**, 4.
- Construction, anticipating defenses. See **HUSBAND AND WIFE**, 1.
- Joinder, tort and contract. See **ACTIONS**, 1.
- Supplemental answer, tender. See **TENDER**, 1.
- Variance. See **INSURANCE**, 6; **LANDLORD AND TENANT**, 3; **MASTER AND SERVANT**, 11; **MUNICIPAL CORPORATIONS**, 10; **TAXATION**, 16.

1. **NEW TRIAL—NONSUIT—PLEADINGS—SUPPLEMENTAL COMPLAINT—NEW CAUSE OF ACTION.** After the granting of a nonsuit because no cause of action existed at the time of the trial, a new trial cannot be granted or a supplemental complaint allowed, to show a cause of action subsequently arising which did not exist when the action was commenced. *Lawrence v. Pederson*..... 1
2. **PLEADINGS—WAIVER BY PLEADING OVER.** A motion to strike portions of a complaint or to make it more definite is waived by pleading over and going to trial on the merits. *Port Townsend v. Lewis*..... 413
3. **PLEADINGS—MOTION TO MAKE DEFINITE—ERROR CURED BY TESTIMONY.** The overruling of a motion to make more definite and certain becomes unimportant in view of testimony subsequently introduced covering the points in question. *Johnston v. Gerry* 524
4. **PLEADINGS—DEMURRER—SEVERAL CAUSES OF ACTION.** A complaint which separately states two causes of action is good as

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against a general demurrer if either cause contains facts sufficient to constitute a cause of action. *Hindle v. Holcomb*..... 336

5. TRIAL—PLEADINGS—OBJECTION TO EVIDENCE. An objection to any evidence is not the way to reach a defect in a complaint in that it seeks to recover more than the plaintiff is entitled to *Id.* 336

6. PLEADINGS—ATTEMPT TO STATE SEVERAL CAUSES OF ACTION—ELECTION BETWEEN CAUSES—REMEDY MISCONCEIVED. Where plaintiff endeavors to state equitable and legal causes as separate causes of action, and in fact but one cause is stated, it is error to require an election and to dismiss the case for failure to elect between the two causes, since a party is not to be turned out of court because he misconceived his remedy, the substance controlling the form of it, and the court should have regarded all the facts stated as one cause, without reference to the erroneous division of the complaint. *Brown v. Calloway*..... 175

7. APPEAL AND ERROR—DECISION—MODIFICATION UPON REHEARING—CONSTRUCTION—PLEADING—NECESSITY OF AMENDMENT—DISMISSAL OF ACTION. Where plaintiff alleged error in refusing leave to amend its complaint to show an assignment to it of the contract sued on, and in its opinion the supreme court in reversing the case at first states that the complaint is sufficient without alleging the assignment, but upon a rehearing the opinion is modified and the conclusion reached that the lower court erred in refusing to allow the amendment, and it is ordered that such leave be granted, the effect of the decision is to make the amendment essential; and upon return of the case it is proper to dismiss the action upon the plaintiff's declining to amend (Fullerton, C. J., dissenting). *Norris Safe and Lock Co. v. Clark*.... 104

8. SAME—TRIAL—WAIVER OF AMENDMENT—ASSIGNMENT FOR TRIAL—DISMISSAL AND NONSUIT. In such a case the defendant's submitting to an assignment for trial when no amendment had been made is not a waiver of the right to a dismissal upon plaintiff's refusing to amend, such dismissal being equivalent to a nonsuit. *Id.*..... 104

9. PLEADINGS—AMENDMENTS—SETTLEMENT—DENIAL OF PAYMENT IN FULL NOT INCONSISTENT WITH ALLEGATION OF PAYMENT UNDER DURESS. Where an answer sets up a payment of \$500 in full settlement of an insurance loss, a reply presenting a plain statement of facts to the effect that the payment was made under duress, denying that it was accepted as a compromise or in any way except on account, is not inconsistent with a general denial of the allegations in the answer respecting the settlement, and no prejudice is sustained by allowing a verbal amendment at the trial

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adding such general denial to the reply. *Bergman v. London and L. Fire Ins. Co.*..... 398

10. PLEADINGS—TRIAL AMENDMENT TO INCLUDE DAMAGES FOR PAIN AND SUFFERING. In an action for personal injuries where evidence of plaintiff's pain and suffering was received without objection, under a complaint detailing all the items of damage without any special demand for such damages, the complaint will, upon appeal, be deemed to have been amended at the trial, as that could have been done as of course. *Gallamore v. Olympia*..... 379

PLEDGE:

1. CORPORATIONS—STOCK—PLEDGE—ACTION TO COMPEL TRANSFER—REMEDIES OF PLEDGEE—ADEQUATE REMEDY. The pledgee of stock in a corporation, pledged as security for a debt, can not maintain an action to compel the transfer of the stock upon the allegations that the debt is unpaid and exceeds the value of the stock and that there is no adequate remedy at law; since Bal. Code, § 4264, treats such pledges as any other personal security and authorizes the pledgor to vote and represent the stock; and the remedies of the pledgee are to foreclose the pledge by bill in equity, or to give notice of sale and apply the proceeds, and these remedies are speedy and adequate (*Pt. Townsend Nat. Bank v. Pt. Townsend Gas etc. Co.*, 6 Wash. 597, followed). *American Bonding and Trust Co. v. Pacific Brewing and M. Co.*..... 10

POSSESSION OF BURGLAR'S TOOLS:

See CRIMINAL LAW, 1.

POWER OF ATTORNEY:

— Evidence to vary terms. See EVIDENCE, 6.

1. POWER OF ATTORNEY—CONSTRUCTION—EXTENT OF AUTHORITY—POWER TO SELL FIXTURES FOR BENEFIT OF CREDITORS. A power of attorney from the owner of a bank authorizing an agent as attorney in fact to take charge of all property and effects of the principal, especially the properties known as said bank, to direct its policies, vote its stock, and, after specifically describing stocks and securities to be sold for the purpose of security for loans or advances, granting full authority to hypothecate, assign, and transfer any and all of the property above set forth, and to do all things advisable, in the discretion of the agent, whether the power is explicitly set forth or not, authorizes the sale of the safe and fixtures of the bank to a trustee for the benefit of its creditors. *Muir v. Westcott*..... 463

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- Authority of. See COMPROMISE, 3-5; CORPORATIONS, 8; INDEMNITY, 1-2; LANDLORD AND TENANT, 5; POWER OF ATTORNEY, 1; SPECIFIC PERFORMANCE, 3.
- Fraud of. See INSURANCE, 1-6.
- 1. PRINCIPAL AND AGENT—COMPROMISE—AUTHORITY OF AGENT. Where a collector was authorized to use his own judgment in making a settlement of an account, he had power to compromise it by accepting less than the total due. *Russell and Co. v. Stevenson* 166
- 2. COMPROMISE—SALE—ABANDONMENT—AGENT'S AUTHORITY TO ACCEPT RETURN OF GOODS. Where, immediately upon the abandonment of a settlement whereby the creditor was to purchase the debtor's goods, the creditor returns the goods to the debtor's nephew, from whom they were received, and who was in charge of the business at the time of the settlement, there is sufficient evidence to support the finding of the jury that the nephew was the debtor's agent for the purpose of accepting a return of the goods. *Seattle Brewing etc. Co. v. Donofrio* 18
- 3. PRINCIPAL AND AGENT—INDEMNITY—AUTHORITY OF ARCHITECT TO MODIFY BUILDING CONTRACT. An architect designated in a building contract as agent for the owner "for the purposes of the contract" has no power to modify any of the terms of the contract unless expressly authorized, and the fact that the owner left it to the architect to secure a contractor's bond, does not authorize him to modify the terms of the contract so that payments were to be made through the surety company, when the contract showing the extent of his authority was exhibited to the surety company. *Sweeney v. Aetna Indemnity Co.* 126
- 4. CONTRACTS—EXECUTION—BILL OF SALE TO AGENT OR TRUSTEE—LIABILITY OF PRINCIPAL WHERE AGENCY IS DISCLOSED. Where parties jointly entered into a contract with another, and for convenience provide for the making of a bill of sale to one of their number instead of to each individually, he becomes their trustee, and they cannot escape liability upon the theory that he acted as their agent, and that principal and agent being both known to the other contracting party, exclusive credit to the agent released them from liability. *Landers v. Foster* 674
- 5. SAME—EVIDENCE BY PAROL TO SHOW AGENCY OF PARTY EXECUTING CONTRACT. Where one of several co-obligors for convenience closes up the contract by taking a bill of sale in his own name, but in fact as trustee for the others, parol evidence is admissible to show who the actual contracting parties were. *Id.* 674
- 6. FRAUD OF AGENT IN MISREPRESENTING PRICE—VALUE OF LAND IMMATERIAL. In an action by a principal for the fraud of his

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agent in misrepresenting the price paid for land purchased, evidence of the value of the land is immaterial. *Hindle v. Holcomb* 336

7. PRINCIPAL AND AGENT—AGENT'S SECURITY FOR ADVANCES—EJECTMENT—FRAUD OF AGENT IN TAKING TITLE—FINDINGS—SUFFICIENCY OF EVIDENCE—JUDGMENT ON PROOFS ORDERED BY SUPREME COURT. Where the heirs of a homestead applicant employ one G to procure title through the instrumentality of an act of Congress, after a rejection of the claim by the secretary of the interior, under an agreement to pay him reasonable compensation and his disbursements, and G spent considerable time, and the jury find that he expended \$1,350 in that behalf without success, and some years later G and others procured title by means of a suit against the state brought by one M, who conveyed to G, and it appears that G secured deeds from two of the heirs covering a two-fifths interest, entered into possession and mortgaged the lands, in an action of ejectment brought by four-fifths of the heirs, the gist of which is the fraud of G in procuring title in himself after entering upon the aforesaid employment, in which action G testifies that he is willing to surrender three-fifths upon payment of three-fifths of his disbursements while employed, a finding and judgment that G was the owner of but a one-fifth interest, and allowing him no lien for his disbursements, is not justified by the proofs or in accordance with justice, and the supreme court will order judgment to the effect that G is the owner of two-fifths subject to the mortgage, and that he have a lien upon the other three-fifths for three-fifths of his disbursements; since an agent purchasing property for his principal has a right to hold it as security for money advanced with the principal's consent. *Johnston v. Gerry*..... 524
8. SAME. In such case, the entire property would be subject to the mortgage, G's two-fifths interest to be first exhausted. *Id.* 524
10. PRINCIPAL AND AGENT—FRAUD OF AGENT IN INDUCING PURCHASE—INSTRUCTIONS. In an action by a principal for the fraud of an agent employed to purchase land at the lowest price obtainable, where the court instructs that the plaintiff cannot recover in this form of action, in case the agent was the owner of the land at the time of the employment, another instruction is not erroneous as contradictory where the court simply distinguishes between actual and feigned ownership, and tells the jury that it is immaterial whether the agent had contracted for the land previous to his employment, if he contracted for the sole purpose of selling it to the plaintiff, and had no intention of buying it if he did not sell to the plaintiff. *Hindle v. Holcomb*..... 336

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11. PRINCIPAL AND AGENT—FRAUD—PLEADINGS—COMPLAINT—SUFFICIENCY—MISREPRESENTATION OF AGENT AS TO PRICE PAID. A complaint by a principal against his agent states a cause of action where it appears that the agent was employed to purchase a certain piece of property at the lowest price obtainable, but misrepresented the price and retained the difference and converted the same to his own use. *Id.* 336
12. SAME—SETTLEMENT BEFORE DISCOVERY OF FRAUD—RECOVERY OF MONEY PAID WITHOUT OBTAINING RESCISSION. Where an agent induced his principal to purchase property by fraudulent representations, and a settlement is made before the discovery of the fraud, whereby the agent was paid a certain sum and was employed to perform further services, the settlement is void in so far as the fraud in the first transaction enters into the same, and the principal may recover the money paid without obtaining a rescission of the settlement. *Id.* 336
13. SAME—FRAUD AFFECTING SUBSEQUENT CONTRACT. A contract to employ an agent to look after property is void where it was entered into as part payment for previous services in purchasing the property and the agent perpetrated a fraud upon the principal in making such purchase. *Id.* 336

PRINCIPAL AND SURETY:

See INDEMNITY.

— Sureties as parties to suit. See APPEAL AND ERROR. 9-12.

PROBATE COURTS:

See COURTS, 1, 2.

PROCESS:

- Foreign Corporations. See CORPORATIONS, 7, 8.
- Mailing summons. See DIVORCE, 1.
- Nunc pro tunc order as to date of filing. See TAXATION, 19.
- Recital. See JUDGMENTS, 1.
- Sufficiency. See TAXATION, 4, 20.

1. PROCESS—PUBLICATION OF SUMMONS WITHIN NINETY DAYS. Where part of the defendants are nonresidents, and personal service of the summons and complaint is made upon a resident defendant, it is not essential that the service upon the nonresidents by publication be commenced within ninety days from the filing of the complaint, if there is no unreasonable delay. *Johnston v. Gerry.* 524

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2. **ACTIONS—DILIGENCE IN PROSECUTION OF ACTION—PROCESS—DELAY IN SERVICE.** A delay of four months in commencing service by publication, after a personal service upon a resident defendant, is not unreasonable or ground for dismissal for lack of diligence in the prosecution of the action, where the delay was caused in part by a second publication made necessary by an error in the first and insisted upon by the defendant personally served and moving the dismissal. *Id.*..... 534

PROHIBITION:

1. **JUDGMENT—INJUNCTION—CONSTRUCTION—PROHIBITION AGAINST THREATENED PUNISHMENT FOR CONTEMPT.** Where a judge threatens to punish as for contempt the sale of beer in no way enjoined by the terms of the signed judgment of the court, a writ of prohibition will issue preventing such action, although the clerk's journal entry of said judgment does enjoin such sale, and the judge claims that the journal entry correctly expressed the decision. *State ex rel. Jensen v. Bell.*..... 185
2. **PROHIBITION — TO PREVENT THREATENED ERROR — REMEDY BY APPEAL—VACATION OF JUDGMENT.** Prohibition will not lie to prevent the threatened erroneous vacation of a judgment, where the same would be a final disposition of the case, since there is an adequate remedy by appeal. *State ex rel. Twigg v. Sup'r Court.*.. 643

PROMISE:

— To repair. See **MASTER AND SERVANT**, 15.

PROSTITUTION:

— Accepting earnings. See **CONSTITUTIONAL LAW**, 1; **STATUTES**, 1, 2.

PROTEST:

— Payment under. See **TAXATION**, 3.

PUBLICATION:

See **PROCESS**.

— Of summons. See **TAXATION**, 21.

PUBLIC LANDS:

— Appropriation of water rights. See **IRRIGATION**, 2.

1. **STATE SCHOOL LANDS—APPROPRIATION FOR USE OF UNIVERSITY—CONSTITUTIONALITY—LEGISLATIVE POLICY—CONSTRUCTION OF PUB-**

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- LIC GRANT. Laws of 1903, p. 137, § 1, and Laws 1893, p. 299, § 9, assigning and directing the selection of 100,000 acres of state lands for the support of the state university, are not unconstitutional on the theory that inasmuch as § 14 of the Enabling Act makes a special provision of 42,080 acres for the university, the intent was to exclude it from the benefits of § 17, granting 200,000 acres for "state, charitable, educational and reformatory institutions;" since no educational institution is excluded from the benefits of said grant, and the amount that may be appropriated therefrom to the use of any one institution is a question of public policy, to be determined exclusively by the legislature. *State ex rel. Moore v. Callvert* 58
2. PUBLIC LANDS—DEED OF STATE—FINDINGS AS TO CHARACTER OF TIDE LANDS—COLLATERAL ATTACK—CLAIM THAT LANDS SOLD AS SECOND CLASS TIDE LANDS ARE OYSTER LANDS. A deed from the state purporting to convey all tide lands of the second class owned by the state abutting upon a certain described shore line, which was sold at the price fixed by law for second class tide lands, must be considered as made after a finding of the state land department as to the character of the land, nothing to the contrary appearing in the record, and includes all the abutting tide lands; and such deed being analogous to a patent is not subject to collateral attack by a subsequent application to purchase a portion of the same lands as oyster lands, upon the theory that the statutory definition of tide lands, Laws, 1897, p. 230, § 4, excepts oyster lands, and that the deed conveyed, therefore, only such part of the abutting tide lands as were not suitable for the cultivation of oysters. *Welsh v. Callvert*..... 250

QUANTUM MERUIT:

- Liability for building used. See SCHOOLS, 4.

QUIETING TITLE:

- Complaint, sufficiency. See EJECTMENT, 3; PLEADING, 6.
 — To timber sold. See PARTIES, 1.

QUO WARRANTO:

1. QUO WARRANTO—AGAINST MUNICIPAL CORPORATIONS BY NAME—TESTING VALIDITY OF INCORPORATION—SUFFICIENCY OF COMPLAINT—PARTIES. Quo warranto does not lie against a municipal corporation to test the validity of the corporation election, since if it has no legal existence it cannot be sued, and the suit must be against the person assuming to act in a corporate capacity. *State ex rel. Pros. Att'y v. South Park*..... 162

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- Doing business in this state, agents. See CORPORATIONS, 7, 8.
- Negligence, in passing of trains. See MASTER AND SERVANT, 19.
- Rules, admissibility. See APPEAL AND ERROR, 48.

RECEIVERS:

- Supersedes of, temporary. See APPEAL AND ERROR, 21, 22.

RECEIVING STOLEN PROPERTY:

- Information. See CRIMINAL LAW, 8.
- Scienter. See CRIMINAL LAW, 21.

RESCISSION:

- Of building contract. See MECHANICS' LIENS, 2-4.
- Of compromise. See COMPROMISE, 4.
- Of lease. See LANDLORD AND TENANT, 2-4.

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- See ARBITRATION AND AWARD, 2.

RIPARIAN RIGHTS:

- See IRRIGATION, 1-4.

SALES:

- See BROKERS; VENDOR AND PURCHASER.
- Abandonment of. See COMPROMISE, 1.
- Bill of sale to trustee, liability on. See PRINCIPAL AND AGENT, 4, 5.
- Bill of sale, oral evidence. See EVIDENCE, 7.
- Conflicting sales of timber, action. See PARTIES, 1.
- Executors, to pay debts. See HOMESTEADS, 1-4.
- Failure to deliver goods. See DAMAGES, 5.
- Minor's estate. See EXECUTORS AND ADMINISTRATORS, 1-4.
- Oral sale of timber. See EVIDENCE, 7.
- Option. See NEW TRIAL, 1.
- Perishable goods rejected. See NOVATION, 1.
- Taxes. See TAXATION.

1. SALE OF STOCK OF GOODS IN BULK—PAYMENT OF CREDITORS.
Upon the settlement of an account by the sale to the creditor of the debtor's entire stock of goods and fixtures of a saloon business, where the vendor was also indebted to others, the purchaser is justified in refusing to carry out the settlement unless the balance due on the purchase price is applied to the payment of

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- the other debts, in accordance with the law relating to the sale of stocks of goods in bulk. *Seattle Brewing etc. Co. v. Donofrio*.... 18
2. SALES—MADE THROUGH BROKER—ACTION BY DEALER AGAINST PURCHASER. Where merchandise was ordered through a broker, knowing that he would secure it from a dealer, the transaction, when completed, is a purchase direct from the dealer, who may maintain an action against the purchaser. *Tilden v. Gordon & Co.* 92
3. SALES—OF STANDING TIMBER BY PAROL—LICENSE TO CUT. A parol sale of standing timber, when acted upon, amounts to a license to cut and remove the timber, which thereupon becomes the property of the licensee. *Welever v. Advance Shingle Co.*.... 331
4. SALES—CONSTRUCTION OF BILL OF SALE—DESCRIPTION OF TIMBER SOLD. The grant in a bill of sale of "all the timber of whatsoever kind and description now standing upon the following described lands," should not be construed as a reservation of fallen timber, but passes title to all timber being upon the lands. *Larson v. Allen*..... 113

SCHOOLS:

- Lands, appropriation of. See PUBLIC LANDS, 1.
 - Warrants, injunction. See PARTIES, 4.
1. SCHOOLS AND SCHOOL DISTRICTS—CONSTRUCTION OF BUILDING—CONTRACTS—ADVERTISING FOR BIDS—CHANGES IN CONTRACT WITHOUT READVERTISEMENT—DISCRETION OF BOARD. After a school board has duly advertised for bids for the erection of a school house, under Bal. Code, § 2366, it may make alterations in the specifications reducing the cost of the building, making proper deductions on account of work eliminated and additions for extras, and thereupon enter into a contract with the lowest bidder, without readvertisement, so long as the general plan of the building remains substantially the same, and the parties act in good faith; and such contract is not *ultra vires*, since said statute does not require more than to invite competitive bidding, and the terms and conditions of the contract are left entirely to the discretion of the board. *Criswell v. Directors School District No. 24*..... 420
2. SAME. When the lowest bid for the construction of a \$32,900 school house was decided by the district to be too expensive, and changes were made to conform the basement to a new site, the name of the building changed, and the size slightly reduced, and ornamental features eliminated, reducing the cost \$6,230, as estimated by the architects, a contract with the lowest bidder for the erection of the building for \$26,670 upon the new site without re-

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advertising for bids is not *ultra vires*, as there is no substantial deviation from the original plans. *Id.*..... 420

3. SAME—FRAUD OF BUILDER AND ARCHITECTS—EVIDENCE OF—SUFFICIENCY. A finding of the trial court that a contractor and architect were guilty of fraud in suggesting changes in the specifications for a school building is not warranted where the specifications in the main were identical, and a committee of the board were unable to find any material changes, except such as were agreed to and deduction made therefor. *Id.*..... 420
4. SAME—FRAUD OF CONTRACTOR IN SECURING CONTRACT—ACCEPTANCE BY SCHOOL BOARD AFTER UNAUTHORIZED DEVIATIONS—RECOVERY ON QUANTUM MERUIT. Where the school district accepts a school building and uses it, after the contractor made many unauthorized deviations and omissions in the work called for by the contract, the district would be liable on a *quantum meruit* for the reasonable value of the building, and the fact that the contractor was guilty of fraud in securing the contract would be immaterial. *Id.* 420

SEAMEN:

— Joinder of actions for injuries. See ACTIONS, 1.

1. SEAMEN—ACTION BY SEAMAN FOR PERSONAL INJURIES—COMPLAINT IN TORT—NO RECOVERY UNDER MARITIME CONTRACT—QUESTION FIRST RAISED ON APPEAL. In an action by a seaman for an injury while in the service of the ship where the complaint is in tort for the negligence of the defendant, without any element of maritime contract, the plaintiff, upon failing to establish negligence, is not entitled to recover for medical attendance and expenses incident to his recovery, under a maritime contract, when the question was first raised on appeal, since the case must be determined upon the theory on which it was tried below (*Sanders v. Stimson Mill Co.*, 32 Wash. 627, overruled in part). *Sanders v. Stimson Mill Co.*..... 357

SELF-DEFENSE:

See CRIMINAL LAW, 10-12.

SETTLEMENT:

See COMPROMISE.

- With agent, fraud. See PRINCIPAL AND AGENT, 12, 13.
- Under duress. See PLEADINGS, 9.

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See BENEFICIAL ASSOCIATIONS.

SPECIFIC PERFORMANCE:

See VENDOR AND PURCHASER.

— Acknowledgment of contract. See FRAUDS, STATUTE OF, 1.

— Tenant in possession. See LANDLORD AND TENANT, 1-4.

1. SPECIFIC PERFORMANCE—CONTRACT TO SELL LAND—COMPLAINT—
ALLEGATION OF OWNERSHIP. A complaint in an action for the
specific performance of an agreement to convey land held under
railroad contracts sufficiently alleges defendant's ownership by a
general allegation of ownership, "as evidenced by contracts of
sale" with the railroad company, and is not defective for failing
to state that such contracts of sale were made with the defendant
or were owned by him. *Hankle v. Denton*..... 51
2. VENDOR AND PURCHASER—SPECIFIC PERFORMANCE—FINDINGS.
Evidence held to warrant the finding that defendant in an action
for the specific performance of a contract to convey land was the
owner thereof and had placed the title in his daughter for the
purpose of fraudulently concealing his ownership. *Id.*..... 51
3. VENDOR AND PURCHASER—SALE BY AGENT—SPECIFIC PERFORM-
ANCE—AUTHORITY OF AGENT—SUFFICIENCY OF EVIDENCE—FINDINGS
—REVIEW. In an action for the specific performance of an agree-
ment to convey land, made on behalf of an aged couple by their
son upon a partial payment of \$100 to the son, findings in favor
of the defendants will not be disturbed where the preponderance
of the testimony is to the effect that the son was not authorized
to make the sale, and the \$100 paid was not accepted but was
tendered back by the son; since findings on conflicting evidence
will not be disturbed unless against the weight of the evidence.
Sherlock v. Van Asselt..... 141

STARE DECISIS:

See DEATH.

STATE AND STATE OFFICERS:

— Actions. See LIMITATION OF ACTIONS, 1-3.

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See APPEAL AND ERROR.

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See FRAUDS, STATUTE OF.

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See LIMITATION OF ACTIONS.

STATUTES:

- Title, sufficiency. See COMMUNITY PROPERTY, 1.
- Construction. See DEATH, 1; PUBLIC LANDS, 1.
- Retroactive. See LIMITATION OF ACTIONS, 1-3.

1. **STATUTES—TITLE OF ACT—LIVING OFF EARNINGS OF PROSTITUTES.**

The subject of the act, Laws 1903, p. 230, making it a felony to live off the earnings of a prostitute, solicit sexual intercourse, or entice or receive a female child into a house of ill-fame for the purposes of prostitution, etc., is sufficiently set out in the title thereof, which is a complete index of the act, while it is only necessary to so state the general purpose and scope of the act that the subject is expressed therein. *State ex rel. Zenner v. Graham* 81

2. **SAME.** The compiler's head lines are no part of the title of

an act, and the act cannot be restricted thereby. *Id* 81

STENOGRAPHERS:

- Fees. See COSTS, 4, 5.
- Disputing notes. See TRIAL, 10.

STOCKHOLDERS:

- See CORPORATIONS.
- Stock assigned. See PLEDGE, 1.

STREET RAILWAYS:

See CARRIERS.

STREETS:

- Negligence. See MUNICIPAL CORPORATIONS, 13-21.
- Obstruction. See HIGHWAYS, 1.
- Possession. See ADVERSE POSSESSION, 2; MUNICIPAL CORPORATIONS, 6.

SUPERSEDEAS:

See APPEAL AND ERROR, 21, 22.

TAXATION:

- Costs. See COSTS, 4, 5.
- Lien for taxes paid. See EXECUTORS AND ADMINISTRATORS, 4.
- Local assessments. See MUNICIPAL CORPORATIONS, 8, 9.
- Presumptions. See COURTS, 3.

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1. TAXATION—TAX DEED—GENERAL TAXES PARAMOUNT TO LOCAL ASSESSMENTS. A purchaser at a sale for general taxes acquires a valid title as against liens for street assessments, since the tax lien is paramount and superior to all other liens. *Ballard v. Way* 116
2. TAXATION—PROCEEDINGS TO ENFORCE—WHAT LAW GOVERNS. Proceedings to enforce a tax need only conform to the law in force at the time of the commencement of the action. *Taylor v. Huntington* 455
3. TAXATION—EXCESSIVE TAX—ACTION TO RECOVER—PAYMENT WHEN NOT VOLUNTARY. The payment of an excessive tax upon real estate, under protest, after tendering a sufficient sum, which the treasurer refused to receive, giving notice at the same time that nothing less than the total sum would be accepted, is not a voluntary payment, and the taxpayer may recover the amount illegally exacted, especially in view of the present statute making the tax a lien, and postponing its enforcement for three years (*Montgomery v. Cowlitz County*, 14 Wash. 230, overruled). *Tozer v. Skagit County* 147
4. TAXATION—FORECLOSURE OF COUNTY DELINQUENCY CERTIFICATES—SUMMONS—SUFFICIENCY. Where a summons in a general tax foreclosure states that the names of the reputed owners precede the description of the land, and that it was assessed to them, and the property is described, it sufficiently appears that the names where known were those given, and also what lands were sought to be subjected to the lien for taxes, and a motion to quash the summons is properly overruled. *Jefferson County v. Trumbull*.. 276
5. TAXATION—FORECLOSURE OF LIEN—DELINQUENCY CERTIFICATE—BOOKS—COMPETENCY WHEN OFFERED EN MASSE. An objection that tax certificate books are incompetent does not raise the point that they related to much other property and were offered *en masse* without reference to any particular page or entry; and in the absence of any demand for particularization their admission is not error. *Id.* 276
6. SAME—BOOKS CERTIFIED BY SUCCESSOR OF OFFICER. Certificate books in the possession of the county treasurer may be certified to by the successor in office of the treasurer who issued them. *Id.* 276
7. SAME—DATE OF ISSUANCE OF CERTIFICATES—IDENTITY OF BOOKS HOW SHOWN. Tax certificate books are competent when it appears from the certificate of the proper officer that the certificates of delinquency therein were issued by the proper officer after four years from the date of delinquency, and where the identity of the books as intended certificates of delinquency further appears from the pages of the books, which were filed with the clerk of the

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superior court prior to the application for judgment and the issuance of judgment thereon. *Id.*..... 276

8. SAME—CERTIFICATES OF DELINQUENCY IN BOOK FORM. Tax certificate books are not incompetent because the law at the time did not expressly authorize their issuance in book form. *Id.*..... 276
9. SAME—FORECLOSURE OF LIEN AN EQUITABLE PROCEEDING—CORRECTION OF MISTAKES. While the foreclosure of delinquency certificates is properly a statutory proceeding the law expressly invokes the equity powers of the court, authorizing amendments and the correction of mistakes, and the entry of judgment on the merits, as the justice of the case requires (*Smith v. Newell*, 32 Wash. 369, followed). *Id.*..... 276
10. TAXATION—SALE FOR CITY TAXES—VALIDITY—FEE FOR CERTIFICATE—NOT PART OF COSTS. Upon a sale of lands for city taxes the addition of \$1.00 for issuing the certificate of sale constitutes such a part of the sum for which the land was sold as to render the certificate void, when the costs allowed by law included only "costs to date of sale," and "costs as advertised," and the notice to the owner did not warn him of any such additional burden (FULLERTON, C. J., dissents). *Gove v. Tacoma*..... 434
11. SAME—FEE FOR CERTIFICATE IN EXCESS OF TAX—ORDINANCE GUARANTEEING REPAYMENT IN CASE OF VOID SALE—OBLIGATION OF PURCHASER TO INVESTIGATE. Where an ordinance guarantees to purchasers at city tax sales the repayment of the original amount with interest from date of sale, in case the sale shall be declared void, the purchaser is under no obligation to make an investigation as to the amount demanded by the city, and the sale is void by reason of the city's having unlawfully demanded a fee of \$1.00 in excess of the tax and costs due, and the city cannot claim that such fee is no part of the sum paid at the sale. *Id.*..... 434
12. SAME—TAX SALE—VALIDITY—EXCESS IN SMALL AMOUNT. A void tax sale for too large an amount cannot be held valid on the ground that the amount of the excess was small. *Id.*..... 434
13. SAME—IRREGULARITIES AVOIDING TAX SALE—EXCESS IN AMOUNT. A summary sale of land for taxes must strictly follow the directions of the law, and is void where there is an excess of one dollar charged, taken in connection with such other irregularities as failure to comply with the requirements to accompany the roll with an affidavit as to its correctness, to carry out in separate columns the amount issued against each owner, to sell in the alphabetical order of the names of the owners, and to offer to sell to the person who would take the least quantity and pay all taxes against the owner (FULLERTON, C. J., dissents). *Id.*..... 434

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14. LIMITATION OF ACTIONS—TAX SALE FOR EXCESSIVE AMOUNT—GUARANTEE OF CITY—ACTION TO RECOVER SUM PAID—STATUTE BEGINS TO RUN WHEN—DISCOVERY OF INVALIDITY OF SALE—KNOWLEDGE OF PURCHASER. Where an ordinance guarantees to purchasers at city tax sales the amount paid in case the sale shall be declared void, and provides for notice thereof to be given the purchaser, the statute of limitations against an action based on the ordinance does not begin to run until the purchaser discovers that the sale was void, and the bare fact that an excessive fee of \$1.00 was unlawful, does not charge the purchaser with knowledge that the sale was void, since the city by the ordinance undertook for itself to make the discovery and notify the purchaser. *Id.*..... 434
15. TAXATION—ACTION TO FORECLOSE COUNTY DELINQUENCY CERTIFICATES—DESCRIPTION OF TRACTS—SUFFICIENCY. In an action to foreclose the county's lien for taxes under delinquency certificates, capital letters and figures standing alone may be used to describe the tracts, where they are abbreviations commonly understood in their relations to each other in the description of lands, in view of Bal. Code, § 1748, providing that letters and figures standing alone may be used to describe the tracts. *Washington Timber & Loan Co. v. Smith.*..... 625
16. SAME—VARIANCE. The use of the fractional " $\frac{1}{4}$ " in the summons is not a variance from the figure "4" in its algebraic exponent position elsewhere used in the proceedings to indicate subdivisions of a section, since both commonly indicate the same thing in descriptions. *Id.*..... 625
17. SAME—JUDGMENT—CERTAINTY—AMOUNT INDICATED BY POSITION OF FIGURES IN COLUMNS. In a general proceeding to foreclose county delinquent tax certificates, the amount of the judgments may be shown by columns of figures, and a line drawn through the column may take the place of the decimal point, when the context shows that was the intention; and a tax lien judgment against many tracts of land, in which the description of the tracts appears in one column, the amounts of the delinquent certificates in another, the 15 per cent interest in another, and the total amount of the judgments in another column, sufficiently designates the amounts of the judgments against the respective tracts of land in the corresponding or opposite columns. *Id.*.... 625
18. SAME—TAX CERTIFICATES—DATE OF ISSUANCE—SIGNATURE OF OFFICER—ACTION WHEN NOT PREMATURE. Where the county treasurer prepared certificate of delinquency books, computing interest to January 31, 1898, which were kept in his office and intended as certificates of delinquency as of that date, but which were not

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- signed by him, and his successor in office, upon foreclosure on behalf of the county, adopted the certificates without computing the interest, making copies thereof, which he signed and filed in the clerk's office in May, 1901, the certificates for all essential purposes were issued at the time of their preparation, January 31, 1898, as the signature of the officer was not essential to the lien held by the county; and hence the law of 1901, p. 385, § 3, prohibiting the bringing of suit at the time upon certificates thereafter issued, has no application. *Id.* 625
19. SAME—DATE OF FILING CERTIFICATES—NUNC PRO TUNC ORDER CHANGING DATE—ESTOPPEL BY FAILING TO OBJECT BELOW. Where in a tax foreclosure the court had jurisdiction of the cause, and by a *nunc pro tunc* order the filing mark on the certificates was changed from June 10, 1901, to May 9, 1901, which latter date was fifteen days before the first publication of the summons as required by the law, an objection that the certificates were not filed in time relates to a mere irregularity, and must be raised in the court below or the party is estopped under the provisions of Bal. Code, § 1767. *Id.* 625
20. SAME—ESTOPPEL OF OWNERS—NOTICE BY PUBLICATION—TAX FORECLOSURE A PROCEEDING IN REM. Under Laws 1901, p. 385, § 3, property owners are required to take notice of tax foreclosure proceedings, although the notice is only by publication, and if the owner does not appear he is estopped by the judgment from raising any questions as to the regularity of the same, since the proceeding is *in rem* and not *in personam*. *Id.* 625
21. SAME—NOTICE OF RECEIPT OF BOOKS—FAILURE OF RECORD TO SHOW PUBLICATION. The failure of the record to show that the treasurer published notice of the receipt of the tax books, as required by Laws 1893, p. 353, § 70, does not invalidate a tax foreclosure, where it is not alleged that such notice was not in fact given, but only that no record thereof exists, as the absence of the record would be a mere irregularity. *Id.* 625

TENDER:

- Acceptance, estoppel. See COMPROMISE, 6.
 - Of tax, necessity. See TAXATION, 3.
1. TENDER—WHEN UNCONDITIONAL—ACCEPTANCE NOT AN ABANDONMENT OF PLAINTIFF'S ACTION—COSTS. A conditional tender of money by defendant in full satisfaction of a claim, is waived by bringing the same into court without condition, and its acceptance by plaintiffs, while so unconditionally tendered, does not waive any rights, and cannot be pleaded in a supplemental an-

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swer as an abandonment of the right of action, since the tender only affects the question of costs. *Tilden v. Gordon & Co.*..... 92

TERRITORIAL COURTS:

See COURTS, 1, 2.

TIDE LANDS:

- Application for. See ADVERSE POSSESSION, 1.
- Character of. See PUBLIC LANDS, 2.
- Sale, subject to rights of navigation. See WATERS, 2.

TRIAL:

- See APPEAL AND ERROR, 5-8, 36-49; CRIMINAL LAW, 9-12, 13-21; EVIDENCE; JUDGMENTS; NEW TRIAL; PLEADINGS.
- Assignment for, waiver of amendment. See PLEADINGS, 8.
- Continuance. See CONTINUANCE, 1.
- Contradicting party's own witness. See MASTER AND SERVANT, 6.
- Dismissal, as estoppel. See ACTIONS, 2.
- Failure of proof. See ASSIGNMENTS, 1.
- Nonsuit, waiver. See APPEAL AND ERROR, 49.
- Question for jury. See MASTER AND SERVANT, 4, 9, 14, 17, 18; MUNICIPAL CORPORATIONS, 11, 12, 14, 16.
- Question of law. See MASTER AND SERVANT, 8.
- Special verdict. See MASTER AND SERVANT, 20.
- Theory of trial. See SEAMEN, 1.

1. TRIAL—REOPENING CASE AFTER CLOSE OF TESTIMONY—DISCRETION. It is not reversible error to reopen the case after defendant closed, for the purpose of allowing plaintiff to introduce further evidence, where no abuse of discretion is shown, and the defendant was allowed, and availed itself of, the same privilege. *Bergman v. London & L. Fire Ins. Co.*..... 398
2. TRIAL—ORDER OF PROOF—ADMISSION OF EVIDENCE IN REBUTTAL—DISCRETION OF COURT. The order of proof is largely in the discretion of the trial court, and unless injustice has been done, a case will not be reversed for the admission of evidence in rebuttal which might have been presented on the state's case in chief. *State v. Druzinman* 257
3. TRIAL—CONDUCT OF COUNSEL. It is not reversible error for counsel to ask insinuating questions, when the court rebuked counsel as soon as objection was made and the offense was not repeated. *Hindle v. Holcomb*..... 336

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4. TRIAL—VERDICT—SUFFICIENCY OF EVIDENCE. The verdict of a jury will not be disturbed where the preponderance of the evidence depends upon the credibility of the witnesses. <i>Id.</i>	336
5. TRIAL—SPECIAL VERDICT—DISCRETION. The submission of special interrogatories to the jury is discretionary, and is not reviewable on appeal. <i>Morrison v. Northern Pac. R. Co.</i>	70
6. SAME. A special finding must be irreconcilably inconsistent with the general verdict to warrant setting the latter aside. <i>Gaudie v. Northern Lumber Co.</i>	34
7. TRIAL—VERDICT—WEIGHT OF EVIDENCE. A verdict should not be set aside because against the weight of the evidence, where there is a substantial conflict on material points, especially where the trial judge who heard the witnesses refused to interfere. <i>Lawson v. Seattle & Renton R. Co.</i>	500
8. TRIAL—INSTRUCTIONS—WEIGHT AS TO EVIDENCE OF EACH WITNESS. It is not error in instructing that it is the duty of the jury to give proper weight to the testimony of each witness to fail to give any definition of the meaning of proper weight. <i>State v. Druzinman</i>	257
9. TRIAL—INSTRUCTIONS. It is not error to refuse to give instructions in the language requested, when they are given in substance in the general charge. <i>Hindle v. Holcomb</i>	336
10. TRIAL—INSTRUCTIONS—COMMENT ON EVIDENCE. It is unlawful comment on the evidence and reversible error for the court, upon a dispute as to what a witness had testified to upon a material point in the case, to declare in the presence of the jury what such evidence was, and to state that the stenographer's report thereof is wrong, and no distinction can be made because the remarks were not addressed to the jury. <i>State v. Glindemann</i>	221
11. AGE OF BOY OPERATING MACHINE—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS—PARTICULAR EVIDENCE. While the practice of trial courts in calling a jury's attention to particular evidence is not to be commended, it is not necessarily reversible error to state that the jury may consider the age and experience of a boy injured while operating a rip saw, upon a question of his contributory negligence. <i>Crooker v. Pacific Lounge & Mattress Co.</i>	191
12. TRIAL—VERDICT—ARRIVED AT BY AVERAGE—MISCONDUCT OF JURY—NEW TRIAL. A verdict determining the amount of damages for personal injuries is not invalid nor ground for a new trial, because it was the result of a computation whereby the quotient of the total of the sums each juror considered proper was adopted, if upon final consideration it receives the sanction of the number of jurors required. <i>Bell v. Butler</i>	131

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- See ATTORNEY AND CLIENT, 2-4.
- Co-tenant receiving award. See PARTITION, 1, 2.
- Evidence by parol. See PRINCIPAL AND AGENT, 4, 5.
- Resulting from deed and oral agreement. See FRAUDS, STATUTE OF, 2-5.
- Title taken by agent. See PRINCIPAL AND AGENT, 7-9.
- 1. TRUSTS—FRAUD—BLIND MORTGAGE IN FRAUD OF CREDITORS—ACCOUNTING BY FRAUDULENT MORTGAGEE AS TRUSTEE—AID REFUSED TO EITHER PARTY. Where a "blind" mortgage was given to protect the property from execution upon an anticipated judgment against the owner, and the property is nevertheless sold on execution and the judgment creditor becomes the purchaser, and afterwards sells the land for a small sum to the holder of such mortgage, the owner is not entitled in equity to an accounting from such mortgagee as a trustee, since the transaction was a fraud which the courts should discourage by refusing aid to either party. *Chantler v. Hubbell*..... 211

UNIVERSITY:

- Appropriation to use of. See PUBLIC LANDS, 1.

UNLAWFUL DETAINER:

- See FORCIBLE ENTRY AND DETAINER.

VARIANCE:

- See PLEADINGS.

VENDOR AND PURCHASER:

- See SPECIFIC PERFORMANCE.
- Lien for purchase money and taxes. See EXECUTORS AND ADMINISTRATORS, 4.
- Option not a sale. See BROKERS, 1-2; NEW TRIAL, 1.
- 1. VENDOR AND PURCHASER—SPECIFIC PERFORMANCE OF SALE—DEFENSES—CONTRACT INDUCED BY FRAUD—PAROL EVIDENCE CONTRADICTING WRITING TO SHOW FRAUD. In an action for the specific performance of a contract to convey land, an answer alleging fraud and false representations in procuring the written contract and showing a different consideration from that expressed, is not demurrable because it shows a different oral agreement varying the terms of the written contract, since oral testimony to vary the terms of a writing is admissible to show that it was induced by fraud and never became operative as a valid contract. *O'Connor v. Lighthizer* 152

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2. **SAME—CONDITIONS PRECEDENT.** The same rule applies to conditions precedent, parol evidence being admissible to show that the contract never took effect by reason of the failure of conditions which were to be first performed by the other party. *Id.*... 152
3. **SAME—SUFFICIENCY OF ANSWER—FRAUDULENT REPRESENTATIONS AS TO FUTURE AND EXISTING FACTS.** In an action for the specific performance of a written contract to sell land for the stated price of \$1,500, an answer alleging fraud in procuring the contract is not insufficient on the theory that the representations relate to future acts to be performed, where it is alleged that plaintiff represented that he was interested with T, a banker in a neighboring city, in the establishment of a bank and loan company for which the land was being purchased, and that upon the organization of the bank the balance of the purchase price, \$1,500, would be paid in stock in the bank, and that the defendant would be made president of the loan company at a salary of \$2,000 a year, all of which was false; since the false representations as to plaintiff's connection with T relate to existing facts which were inducements to entering into the contract. *Id.*..... 152
4. **SAME—DUTY OF VENDOR TO INVESTIGATE.** Such answer is not insufficient on the theory that defendant might have investigated and ascertained the truth, where it appears that the representations were made at H, some distance from the city where the banker T resided, and that plaintiff was then at H claiming to represent T, since reasonable means for investigation were not at hand at the time. *Id.*..... 152
5. **VENDOR AND PURCHASER—SPECIFIC PERFORMANCE OF CONTRACT TO CONVEY—DEFENSES—MUTUAL MISTAKE INCLUDING LAND NOT OWNED—EVIDENCE—SUFFICIENCY.** In an action for the specific performance of a contract to sell a tract of land purchased for the timber thereon, in which the defendants claim that ten acres previously sold by them to another, and which was cleared land and occupied, was included by mutual mistake, findings for the defendant will not be disturbed where the plaintiff testifies that he was familiar with the land, knew of the other purchaser's house and improvements, and did not think at the time that he was getting the house and land around it. *Reid v. Slocum.*..... 173

VERDICT:

See TRIAL; APPEAL AND ERROR, 36.

— Excessive. See DAMAGES, 3, 4.

WAIVER:

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- Of defect in pleading. See PLEADINGS, 2, 8.
- Of defect of parties. See PARTIES, 4.
- Of nonsuit. See APPEAL AND ERROR, 49.
- Of time limit. See ARBITRATION AND AWARD, 1..

WATERS:

- Appropriation, priority. See IRRIGATION.
- 1. **WATERS—NAVIGABILITY—SUFFICIENCY OF EVIDENCE.** A channel in a slough forming an arm of Puget Sound, which, while the tide ebbs and flows therein, is used as a public highway for boats and for rafting and towing logs, is navigable water, since it is navigable in a legal sense if it is in fact, although it may not be navigable at low tide. *Dawson v. McMillan*..... 269
- 2. **SAME—BED OF NAVIGABLE WATERS—SALE BY STATE—OBSTRUCTIONS BY PURCHASER.** The sale of tide lands by the state is subject to the paramount right of the public in the navigable waters thereon, and confers no right to obstruct navigation therein. *Id.*.. 269
- 3. **SAME—PUBLIC NUISANCE—OBSTRUCTION TO NAVIGATION—WHO MAY MAINTAIN ACTION—PARTIES SPECIALLY INJURED.** Owners of timbered lands whose only means of getting logs to market is by the use of certain navigable waters, are specially damaged by an obstruction of the same which prohibits such use of the waters, and may maintain an action to enjoin such obstruction as a public nuisance. *Id.*..... 269

WILLS:

- Agreement passing title on death. See COMMUNITY PROPERTY, 2.
- 1. **WILLS—CONTEST—BURDEN OF PROOF—APPEAL—TRIAL DE NOVO.** Upon the contest of a will which has been admitted to probate *ex parte*, the burden of proof is upon the contestants to establish every material fact alleged; but the ruling of the trial court upon this point is immaterial, since the supreme court tries the case *de novo*. *Hunt v. Phillips*..... 362
- 2. **WILLS—CONTEST—CONSTRUCTION—NO PRESUMPTION IN FAVOR OF HEIRS.** In construing a will contested by disinherited heirs, no presumptions can be indulged in favor of rights conferred by the law of descent and distribution, which are no more potent than the right to make a voluntary distribution. *Id.*..... 362
- 3. **WILLS—EXECUTION—UNDUE INFLUENCE—COST TO CONTESTANTS.** Evidence examined, and found to sustain findings of due execution, lack of undue influence, and testamentary capacity, and that

WILLS—CONTINUED.

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an allowance for costs to the contestants was properly refused.

Id. 362**WITNESSES:**

— Transaction with deceased. See PARTIES, 3.

— Intoxication. See CONTINUANCE, 1.

1. **WITNESSES—EVIDENCE OF TRANSACTIONS WITH DECEASED—PARTY IN INTEREST—EMPLOYEE OF STREET CAR COMPANY—ACTION FOR NEGLIGENCE OF EMPLOYEE.** Where a street railway company is sued for personal injuries by the estate of a deceased person, sustained through the negligence of the motorman in charge of the car at the time of the accident, such employee is not a party in interest, and may testify as to a conversation had between him and the deceased, relative to the accident, when he was not made a party, and was not notified to appear and defend. *O'Toole v. Faulkner*.. 371

WRITS:

— Of restitution. See LANDLORD AND TENANT, 4.

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